

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
APPENDIX**





B  
215

# 74-20488

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ORIGINAL

In The  
United States Court of Appeals  
For The Second Circuit

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COMPETITIVE ASSOCIATES, INC.,  
Appellant,

vs.

LAVENTHOL, KREKSTEIN, HORWATH & HORWATH,  
MORTON DEAR, ROBERT BIER and THOMAS MARTINO,  
Appellees.

On Appeal from the United States District Court  
for the Southern District of New York.

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APPELLANT'S APPENDIX

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Butowsky, Schwenke & Devine  
Attorneys for Appellant  
230 Park Avenue  
New York, N. Y. 10017  
(212) 725-5360

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## CIVIL DOCKET

UNITED STATES DISTRICT COURT

## DOCKET ENTRIES

Jury demand date:

72 CIV. 1986

1a

D. C. Form No. 105 Rev.

## TITLE OF CASE

## ATTORNEYS

COMPETITIVE CAPITAL CORPORATION AND COMPETITIVE  
ASSOCIATES, INC.

VS.

For plaintiff:

LAWLER, STERLING &amp; KENT.

500 FIFTH AVENUE,  
N.Y.C. N.Y. 10036

ATTYS. for DEFTS

(2-21-74)

Amen Weisman & Butler (deft. A. Yamada)  
17 E. 63rd St., NYC 10021 - TE 8-2323Willkie Farr & Gallagher (Laventhol Krekstein  
Horwath & Horwath) 1 Chase Manhattan Plaza  
NYC, 10005 248-1000

For defendant:

Shoa Gould, Climenko & Kramer (Laventhol  
Krekstein, Horwath & Horwath) 330 MK  
Madison Ave., N.Y. 10017

CHRISTY FRAY CHRISTY

45 Rockefeller Plaza NYC 10020  
(Defts: Dear, Bior, Martino)Feiner-Curtis-Smith-Goldman 1919 3rd Ave NY  
10022 (Deft Ira N Smith)JOSEPH J. MARCHESO (Laventhol Krekstein & Tatar  
Asset Management Corp.) 45 Rockefeller Plaza  
NYC 10020Hart & Hume (for Ira N. Smith)  
10 East 40th St. NY 10016

## STATISTICAL RECORD

## COSTS

## DATE

NAME OF  
RECEIPT NO.

## PAGE

## DEB.

U.S. 5 mailed

X

Clerk

U.S. 6 mailed

Marshal

Basis of Action:

Docket fee

S.E.C. ACT. 1933&amp;34

Witness fees

Action arose at:

Depositions

A TRUE COPY

RAYMOND P.

C. E. Thompson

72 Civ. 1986 - Competitive Capital Corp. -v- Akiyoshi Yamada, et al

72 Civ. 1986

CIVIL DOCKET

Page 2

GRIESA, J.

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED EMOLUMENT RETURN
Feb. 28-74	Filed deft's (Laventhol Krekstein Horwath & Horwath) affdvt. & notice of motion for summary judgment - ret. 3-13-74 ..	
Feb. 28-74	Filed Statement pursuant to Rule 9(g)	
Feb. 28-74	Filed memorandum of law in support of motion	
Mar. 5-74	Filed defts Dear & Martino's affdvt & notice of motion for summary judgment. Ret. 3-13-74.	
Mar. 5-74	Filed defts 9(g) statement with motion.	
Apr. 1-74	Filed copy of consent to change atty. filed 2-21-74	
Apr. 9-74	Filed plffs. affdvt. in opposition to defts. motion for Summary judgment.	
Apr. 9-74	Filed plffs. counter-statement pursuant to Rule 9 (g).	
Apr. 9-74	Filed plffs. memo in opposition to defts. motion for summary judgment.	
Apr. 10-74	Filed deft (LKH&H's) reply affdvt in support of their motion for summary judgment.	
Apr. 10-74	Filed deft (LKH&H's) reply memo in support of motion for summary judgment.	
May 16-74	Filed consent and order of substitution of Attys. for deft. Laventhol Krekstein Horwath & Horwath. GRIESA, J.	
May 22-74	Filed defts. (Smith) notice of deposition of Peter Landau.	
Jun. 4-74	Filed transcript of 12-21-73.	
May 24-74	Filed deft (Smith's) notice to take deposition of J.R. Randolph.	
Jun. 26-74	Filed Opinion #40875. Motions for summary judgments are granted, & action is dismissed as to defts (Lavanthal, et al) & (Dear & Martino). Although deft Bier has not moved for summary judgment, complaint is dismissed as to him, & Clerk is directed to enter judgment as to these defts....GRIESA, J. m/n M	
Jun. 26-74	Filed plffs answer to reply papers of LKH&H on motion for summary judgment.	
Jun 25-74	Filed deft's (Ira N. Smith notice to take deposition by James B. Barron.	
Jun 25-74	Filed deft's (Ira N. Smith notice to take deposition by Arthur Underhill.	
July 3-74	Filed Judgment & order that defts Laventhol, Krekstein, Horwath & Horwath, Morton Dear & Thomas Martino, Jr., have judgment against the plffs Competitive Capital Corp. & Competitive Associates, dismissing the complaint as to them, and also ordered that the complaint be dismissed as to deft. Robert E. Bier, Griesa, J.	
Jul. 16-74	Filed deft (Smith's) notice to take deposition of A.J. Underhill, Subpoena issued.	

CONTINUE ON BACK (page 3)



INSTITUTIONAL CREDIT CORP., ET AL V. AKIYOSHI YAMADA, ET AL

JUDGE EDDEL

JUDGE EDDEL  
72 CIV. 198

DATE	PROCEEDINGS	Date of Judgment
MAY 9-72	FILED COMPLAINT. ISSUED SUMMONS.	
JUN 7-72	Filed stipulation and order extending depts. Dear, Bier, Martino, Jr. and Laventhol, Krekstein, Horwath & Horwath's time to answer complaint to 7/7/72. So ordered. Colner, J.	
JUL 5-72	Filed Dft. Laventhol Krekstein Horwath & Horwath Notice of Deposition of plfff. on July 20, 1972.	
JUL 5-72	Filed Dft. Laventhol Krekstein Horwath & Horwath Notice of Deposition of plfff on 7/24/72.	
JUL 5-72	Filed Df. Laventhol Krekstein Horwath & Horwath ANSWER.	
JUL 11-72	Filed Affidvt of service by mail by Dft. Laventhol, Krekstein, Horwath & Horwath of the Answer and notices to take deposition of plffs.	SGC
JUL 10-72	Filed Defts' Morton Dear, Bier, & T. Martino Jr. ANSWER to the complaint.	
JUL 27-72	Filed Dft Laventhol, Krekstein, Horwath & Horwath request to produce.	CFC
JUL 27-72	Filed Dft " " " " Interrogs.	
JUL 27-72	Filed Dft Ira N. Smith ANSWER to complaint.	
JUL 31-72	Filed Defts Akiyoshi Yamada and Takara Asset Management Corp. ANSWER to the complaint.	FCSG
AUG 8-72	Filed Summons & entered Marshal's return --- Served Ira N Smith --- 6-7-72 Served Thomas Martino Jr. 5-22-72 Served Morton Dear 5-22-72 Served Akiyoshi Yamada 5-24-72 Unable to serve Takara Asset Mgt. Corp. Served Robert E Bier 5-22-72 Served Laventhol, Krekstein, Horwath 5-22-72	
SEPT 7-72	Filed Pltffs' Answers to deft Laventhol, Krekstein, Horwath & Horwath's interrogs.	
SEP. 20-72	Filed stip. and order that the depositions of pltffs' by deft. Laventhol, Krekstein, Horwath & Horwath be ext. from 9-12-72 to 10-11-72 etc. Edelstein, Ch. J.	
Dec. 7-72	Filed Order substituting Hart & Hume as attorneys for deft. Ira H. Smith. Stewart, J. (mailed notice).	
Dec 18-72	Filed Affidvt of service of order consenting to substitution of attys.	
Jan 19-73	Filed Dft. Ira N. Smith Notice of Deposition upon pltffs.	
Jan 21-73	Filed by plfff notice to take deposition of deft. Akiyoshi Yamada on 6-26-73.	
JUL 5-73	Filed Interrogs. to plaintiff - filed by Dft. Ira H. Smith.	
SEP. 27-73	Filed deft's (I. Smith) affidvt & notice of motion to strike pleading-Ref. to be set.	
OCT. 10-73	Filed pltffs' answers to interrogs.	
Nov. 1-73	Filed Affidavit by Martin R. Pollner.	
Nov. 1-73	Filed Memo. End. on motion dated 9/27/73. Motion withdrawn. Edelstein Ch J.	
Nov. 5-73	Filed pltffs' notice of deposition of Phillip Kaye	
Nov. 12-73	Filed Pltffs. Notice of deposition of Chartered New England Corp., on 11/28/73.	
Nov. 12-73	Filed Pltffs. Notice of deposition of /Chartered New England Corp., on 11/28/73. (2nd on)	
Dec. 3-73	Filed Pltffs. Notice of Appearance as counsel to attys of record for pltffs.	
Dec. 26-73	Filed affidvt & notice of motion to quash subpoena-Ref.	
Dec. 26-73	Filed memo endorsed on motion filed this date Motion denied in all respects- Edelstein, Ch. J.	
Dec. 26-73	Filed brief of witness in support of motion to quash.	
Dec. 26-73	Filed pltffs' affidvt in opposition to motion to quash.	
Dec. 26-73	Filed pltffs' memorandum in opposition to motion for protective order.	
Dec. 28-73	Case reassigned to Judge Griesa.	
Jan. 15-74	Filed deft's (Ira N. Smith) notice to take deposition of pltffs. by Michael Wisman	
Jan. 15-74	Filed deft's (Ira N. Smith) notice to take deposition of pltffs. by J. Perry Smith	
Jan. 15-74	Filed deft's (Ira N. Smith) notice to take deposition of pltffs. by Henry Homes, Jr.	
Feb. 15-74	Filed pltffs' notice to take deposition of John Peter Galanis	
Feb. 21-74	Filed consent & order substituting attys. for deft. Yamada--Griesa, J.	

cont'd on page 2



DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN INDOLEMEN RECEIPTS
	Competitive Capital Corp.	
Jul 25-74	Filed Pltff's Notice of Appeal to USCA from the order dated 6-26-74 and the judgment ent. thereon...Notices Mailed on 7-26-74 to: Lawler, Sterling & Kent-----Amen, Weisman & Butler---Willkie, Farr & Gallagher.-- --Christy, Fry & Christy-----Hart & Hume.	
Jul 25-74	Filed Pltff. Competitive Assos. Inc.'s Notice of Appeal to USCA from the order dated 6-26-74, and the Judgment ent. thereon....Notices mailed 7-26-74 to: BUTOWSKY, SCHWENKE & DEVINE-----AMEN, WEISMAN & BUTLER---WILKIE, FARR & GALLAGHER-----CHRISTY, FRY & CHRISTY---HART & HUME.	

## United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. \_\_\_\_\_

72 - 1986

COMPETITIVE CAPITAL CORPORATION and  
COMPETITIVE ASSOCIATES INC.,

Plaintiff

v.

SUMMONS

AKIYOSHI YAMADA, LAVENTHOL, KREKSTEIN,  
HORWATH AND HORWATH, MORTON DEAR,  
ROBERT E. BIER, THOMAS MARTINO, JR., ,  
TAKARA ASSET MANAGEMENT CORPORATION,  
and IRA N. SMITH,

Defendant

To the above named Defendant :

You are hereby summoned and required to serve upon

LAWLER, STERLING &amp; KENT

plaintiff's attorney , whose address is

500 Fifth Avenue  
New York, New York 10036

an answer to the complaint which is herewith served upon you, within 20 days after service of this  
summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be  
taken against you for the relief demanded in the complaint.

151 JOHN LIVINGSTON

151 E.A. BECKER

Clerk of Court.



Date:

MAY 9 1972

[Seal of Court]

**NOTE:**—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

RETURNS OF SERVICE

THESE PAGES REPRODUCED ILLEGIBLY  
AND THEREFOR HAVE BEEN DELETED  
FROM THIS APPENDIX BY STIPULATION  
OF THE PARTIES.



## 11a

72 Civil Action No.

COMPLAINT

1. The jurisdiction of this Court is based upon Section 22(a) of the Securities Act of 1933, as amended, Title 15, United States Code §77v(a) (the "1933 Act"); Section 27 of the Securities Exchange Act of 1934, as amended, Title 15, United States Code §78aa (the "1934 Act"); Section 44 of the Investment Company Act of 1940, Title 15, United States Code §80a-43 (the "Investment Company Act"); Section 214 of the Investment Advisers Act of 1940, Title 15, United States Code §80b-14 (the "Investment Advisers Act"); and the principles of pendent jurisdiction.

2. This action incorporates allegations against the defendants herein contained in a certain complaint of the Securities and Exchange Commission (the "SEC Complaint") pending in this Court, numbered 71 Civil Action 4932.

3. Competitive Capital Corporation ("Competitive Capital"), is incorporated under the laws of, and has its principal place of business in, the State of California. It is registered as an investment adviser under the Investment Adviser Act of 1940 and serves as the Fund Manager for Competitive Associates Inc. Competitive Associates Inc. ("Competitive Associates"), is incorporated under the laws of the State of Delaware, and has its principal place of business in the State of California. It

is a management open end investment company registered with the Securities and Exchange Commission (the "Commission") pursuant to Section 8 of the Investment Company Act of 1940 as amended. Competitive Associates has net assets of approximately \$10,000,000 and nearly 10,000 shareholders.

4. The Defendant, Akiyoshi Yamada ("Yamada"), is an individual who, upon information and belief, is, and was at all times pertinent hereto, a resident of the City and State of New York.

5. The Defendant, Laventhol, Krekstein, Horwath and Horwath ("Laventhol"), is, upon information and belief, a partnership of public accountants with offices in East Brunswick, New Jersey.

6. The Defendant, Morton Dear ("Dear"), is an individual who, upon information and belief, is, and was at all times pertinent hereto, a partner of Defendant Laventhol.

7. The Defendant, Robert E. Bier ("Bier"), is an individual who, upon information and belief, is, and was at all times relevant hereto, employed by the Defendant Laventhol.

8. The Defendant, Thomas Martino, Jr. ("Martino"), is an individual who, upon information and belief, is, and was at all times pertinent hereto, an employee of Defendant Laventhol.

9. The Defendant, Takara Asset Management Corporation ("Takara Management"), is, upon information and belief, and was, at all times pertinent hereto, a portfolio management company with offices in New York City. During the period from approximately October 1970 through May 1971, Takara Management managed a portion of the portfolio of Competitive Associates.



10. The Defendant, Ira N. Smith ("Smith"), is an individual who, upon information and belief, is, and was at all times pertinent hereto, a partner in the law firm of Feiner, Curtis, Smith & Goldman with offices in New York City.

Violation of Section 17(a) of the 1933 Act, of Section 10(b) of the 1934 Act and Rule 10b-5 thereunder, and Sections 206(1) and (2) of the Investment Advisers Act.

11. In early 1971, Defendants Yamada, Laventhol, Dear, Bier and Martino singly and in concert, directly and indirectly in connection with the purchase and sale of securities disseminated or caused to be disseminated to Competitive Capital and Competitive Associates financial statements for Takara Partners, a limited partnership organized under the laws of New York for the purpose of investing in securities, of which Defendant Yamada was a general partner, which financial statements were certified by Defendant Laventhol, and which included an income statement for the period from July 16, 1969 (inception) to December 31, 1969 and a balance sheet as of December 31, 1969. These statements represented, among other things, that:

A. Takara Partners had:

- (1) Net income of \$452,343;
- (2) Unrealized profit of \$555,945;
- (3) Total current assets of \$4,248,612;
- (4) Total current liabilities of \$978,628;
- (5) Marketable and restricted securities valued at \$3,287,544;
- (6) Put options available with a value of \$410,375;

B. Defendant Laventhol was independent and was qualified to certify as such to the financial statements of Takara Partners.

12. The financial statements described in the foregoing paragraph were false and misleading in that, among other things:

- (1) Takara Partners had no net income, but substantial losses;
- (2) Takara Partners had no unrealized profit and a substantial unrealized loss;
- (3) The total current assets figure included non-existent items and items whose values were grossly overstated;
- (4) The total current liabilities figure was understated by approximately \$400,000;
- (5) Values of securities were grossly overstated;
- (6) The purported put options did not exist;
- (7) Defendant Laventhol was not independent and was not qualified to certify the financial statements of Takara Partners because Defendants Dear, Bier and Martino, partners and/or employees of Laventhol during the period of time when they were working on the preparation of the financial statements, had received payments from Defendant Yamada and another totaling approximately \$17,000 in the guise of profits from participation in the purchase and sale of "hot issues."

13. In addition, the financial statements of Takara Partners failed to disclose, among other things:

- (1) That many of the securities in the portfolio were securities of issuers with minimal assets and no past history of earnings which had been purchased in large blocks and that the market for most of these securities was very limited and highly volatile;



- (2) That restricted securities had been valued at arbitrary and excessive figures by persons who were close business associates of Defendant Yamada and who had in many cases been involved in the transactions in which the securities had been purchased;
- (3) That \$240,000 included in the total current asset figure had been misappropriated from a certain Delaware corporation;
- (4) That during the period from December 31, 1969 to the date of issuance of the financial statements, significant partnership events had occurred including, among other things:
  - (a) Payments made on previously undisclosed liabilities;
  - (b) Receipt of additional funds misappropriated from the certain Delaware corporation;
  - (c) Further losses and deterioration of the financial condition of Takara Partners;
- (5) The manner in which securities had been purchased from Takara Partners;
- (6) The control and manipulation by Defendant Yamada and his associates of the market for some of the securities purchased for Takara Partners.

14. By reason of the activities described in paragraphs 11 through 13 above, Defendants Yamada, Laventhol, Dear, Bier and Martino violated Section 17(a) of the 1933 Act, Section 10(b) of the 1934 Act and Rule 10b-5 thereunder, and Sections 206(1) and (2) of the Investment Advisers Act, as a result of which Competitive Capital and Competitive Associates ultimately suffered damages aggregating six million dollars (\$6,000,000).

Breach of Fiduciary Obligations and Fraud

15. The allegations and paragraphs 11 through 13 of this Complaint are realleged and incorporated herein by reference.

16. The Defendants Yamada, Laventhol, Dear, Bier and Martino, individually and acting in concert, have breached their fiduciary obligations toward and have perpetrated a fraud on Competitive Capital and Competitive Associates in that their activities, statements and omissions of material facts constituted misrepresentations known by these Defendants to be false, knowingly made by the Defendants to Competitive Capital and Competitive Associates, on which a reasonable man would rely and on which Competitive Capital and Competitive Associates did rely, as a result of which Competitive Capital and Competitive Associates ultimately sustained damages aggregating six million dollars (\$6,000,000.)

Violation of Section 17(a) of the 1933 Act, of Section 10(b) of the 1934 Act and Rule 10b-5 thereunder, of Sections 206(1) and (2) of the Investment Advisers Act, and of Sections 17(d), Sections 17(e), Section 36, Section 36(a) and Section 37 of the Investment Company Act.

17. In or about June 1970, in an effort to obtain employment as manager of the investment activities of Competitive Associates, Defendants Yamada and Takara Management made false and misleading representations to Competitive Capital and Competitive Associates including, among other things, that:

- (1) Takara Partners had \$6,000,000 in assets;
- (2) The net assets value of Takara Partners had increased by 14.3% in 1969;
- (3) A certain Armstrong Investors had assets in excess of \$8,000,000; and



- (4) The net asset value of Armstrong Investors had increased 8.5% during the period March through June of 1970.

These representations were false and misleading in that Takara Partners never had \$6,000,000 in assets, but had at the most \$2.8 million as described in paragraph 19 of the Complaint of the Securities and Exchange Commission herein (the "SEC Complaint"), which assets were dissipated as described in paragraphs 69a through 81 and 220 through 222 of the SEC Complaint. These representations were also false for the reasons stated in paragraphs 204, 208, 234 and 235 of the SEC Complaint and because Defendants Yamada and Takara Management failed to disclose the activities described in paragraphs 69a through 236 in the SEC Complaint. The above-mentioned paragraphs of the SEC Complaint are incorporated herein by reference.

18. As a result of these representations, Defendants Yamada and Takara Management were employed to manage approximately \$8,500,000 of the assets of Competitive Associates and many of the false representations made to Competitive Capital and Competitive Associates by Defendant Yamada, including the false representations regarding the performance of Takara Partners, were repeated in news releases and in communications to shareholders and otherwise. During the period from approximately October 1970 through May 1971, when Defendants Yamada and Takara Management managed a portion of the investment portfolio of Competitive Associates, they purchased securities at artificially inflated prices with little or no investment merit and for purposes of personal profit, and without regard to the interests of Competitive Capital or Competitive Associates and its shareholders. As a result that portion of the portfolio of Competitive Associates sustained losses of approximately five million dollars (\$5,000,000).

19. By reason of the activities described in paragraphs 17 and 18, Defendants Yamada and Takara Management violated Section 17(a) of the 1933 Act, Section 10(b) of the 1934 Act and Rule 10b-5 thereunder,

Sections 206(1) and (2) of the Investment Advisers Act, Sections 17(d), 17(e), 36, 36(a) and 37 of the Investment Company Act and Rule 17d-1 thereunder, as a result of which Competitive Capital and Competitive Associates ultimately suffered damages aggregating six million dollars (\$6,000,000).

Violation of Section 17(a) of the 1933 Act, of Section 10(b) of the 1934 Act and Rule 10b-5 thereunder, of Sections 206(1) and (2) of the Investment Advisers Act, and of Sections 36 and 36(a) of the Investment Company Act.

20. From in or about January 1971 through May 1971, for the purpose of concealing the activities of Defendant Yamada as alleged in the SEC Complaint so that Defendant Yamada would be retained as investment manager of a portion of the assets of Competitive Associates, Defendants Yamada, Takara Management and Smith made false and misleading statements and withheld information concerning among other things:

- (1) The fact that Defendant Yamada was participating in the management of a certain Everest Management Corporation and purchasing securities for a certain Armstrong Capital, and that he was acting in conjunction with others;
- (2) That an investigation was then being conducted by the Commission into the activities of Defendants Yamada and Takara Management and Takara Partners had been served subpoenas duces tecum by the Commission on December 31, 1970 requiring the appearance of Defendant Yamada and the production of records in connection with such investigation;
- (3) The lack of investment merits of certain securities purchased for accounts managed by Defendants Yamada and Takara



Management, including Armstrong Capital, Takara Partners and Competitive Associates, and circumstances surrounding the purchase of such securities, including the compensation and profits received by Defendant Yamada;

- (4) The increases in net asset value and profits of the accounts managed by Defendant Yamada; and
- (5) The activities described in the SEC Complaint.

21. By reason of these activities described in paragraph 20, Defendants Yamada, Takara Management and Smith violated Section 17(a) of the 1933 Act, Section 10(b) of the 1934 Act and Rule 10b-5 thereunder, and Sections 206(1) and (2) of the Advisers Act, and Defendants Yamada and Takara Management violated Sections 36 and 36(a) of the Investment Company Act, as a result of which Competitive Capital and Competitive Associates ultimately suffered damages aggregating six million dollars (\$6,000,000).

Breach of Fiduciary Obligations and Fraud

22. The allegations of paragraph 20 of this Complaint are re-alleged and incorporated herein by reference.

23. The Defendants Yamada, Takara Management and Smith, individually and acting in concert, have breached their fiduciary duties toward and perpetrated a fraud upon Competitive Capital and Competitive Associates in that their activities, statements and omission, of material facts constituted misrepresentations, known by these Defendants to be false, knowingly made by these Defendants to Competitive Capital and Competitive Associates, on which a reasonable man would rely, and on which Competitive Capital and Competitive Associates ultimately suffered damages aggregating six million dollars (\$6,000,000).

WHEREFORE, Competitive Capital and Competitive Associates pray a judgment against the Defendants Yamada, Laventhol, Dear, Bier, Martino, Takara Management, and Smith, individually and jointly, in the amount of six million dollars (\$6,000,000), together with applicable interest and the costs and disbursements of this action.

LAWLER, STERLING & KENT  
500 Fifth Avenue  
New York, New York 10036  
(212) 736-7050

By \_\_\_\_\_  
A Member of the Firm

Of Counsel:

James Michael Cassidy, Esq.  
Lawler, Sterling & Kent  
1156 15th Street, N.W.  
Washington, D.C. 20005  
(202) 293-2240



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

COMPETITIVE CAPITAL CORPORATION and  
COMPETITIVE ASSOCIATES INC.,

72 Civ. 1986

Plaintiffs

against

AKIYOSHI YAMADA, LAVENTHOL, KREKSTEIN,  
HORWATH & HORWATH, MORTON DEAR,  
ROBERT E. BIER, THOMAS MARTINO, JR.,  
TAKARA ASSET MANAGEMENT CORPORATION  
and IRA N. SMITH,

ANSWER OF DEFENDANT  
LAVENTHOL, KREKSTEIN,  
HORWATH & HORWATH

Defendants.

---

Defendant Laventhol, Krekstein, Horwath & Horwath,  
by its attorneys, Shea Gould Climenko & Kramer, answers the  
complaint as follows:

1. Denies the allegations of paragraph "1" of the complaint.
2. Denies the allegations of paragraph "2" of the complaint except admits that certain allegations in the complaint herein are the same as, or similar to, certain allegations in the complaint in an action entitled Securities and Exchange Commission v. Everest Management Corporation, et al., 71 Civ. 4932 and respectfully refers to the latter complaint for the contents thereof.
3. Denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "3" and "4" of the complaint.

4. Admits the allegations contained in paragraphs "5", "6", "7" and "8" of the complaint.

5. Denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "9" and "10" of the complaint.

6. Denies the allegations of paragraphs "11", "12", "13" and "14" of the complaint except admits that it certified financials statements for Takara Partners for the period July 16, 1969 to December 31, 1969, which statements speak for themselves, and denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs "11", "12", "13" and "14" of the complaint insofar as they relate to defendants other than Laventhol, Krekstein, Horwath & Horwath.

7. With respect to paragraph "15" of the complaint, Laventhol, Krekstein, Horwath & Horwath repeats and realleges each and every denial of paragraph "6" of this answer with the same force and effect as if set forth more fully herein.

8. Denies the allegations of paragraph "16" of the complaint except denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph "16" of the complaint insofar as they relate to defendants other than Laventhol, Krekstein, Horwath & Horwath.



9. Denies that it has knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "17" through "23", inclusive, of the complaint.

FIRST AFFIRMATIVE DEFENSE

10. The complaint fails to state a claim against Laventhol, Krekstein, Horwath & Horwath upon which relief may be granted under Section 17(a) of the Securities Act of 1933 or Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, in that the alleged activities of Laventhol, Krekstein, Horwath & Horwath were not performed in connection with the purchase or sale of securities.

SECOND AFFIRMATIVE DEFENSE

11. The complaint fails to state a claim against Laventhol, Krekstein, Horwath & Horwath upon which relief may be granted under Sections 206(1) and (2) of the Investment Advisers Act of 1940.

THIRD AFFIRMATIVE DEFENSE

12. The complaint fails to state a claim against Laventhol, Krekstein, Horwath & Horwath upon which relief may be granted under applicable law with respect to breach of fiduciary obligations and fraud.

FOURTH AFFIRMATIVE DEFENSE

13. The Court lacks subject matter jurisdiction over the activities of Laventhol, Krekstein, Horwath & Horwath alleged in the complaint.

WHEREFORE, defendant Laventhol, Krekstein, Horwath & Horwath respectfully requests that a judgment be entered herein dismissing the action as against it, with costs and disbursements, and granting such further relief as the Court deems proper.

SHEA GOULD CLIMENKO & KRAMER

By Michael Leach  
A Member of the Firm  
330 Madison Avenue  
New York, New York 10017

Attorneys for Defendant  
Laventhol, Krekstein, Horwath  
& Horwath.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

25a

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COMPETITIVE CAPITAL CORPORATION and :  
COMPETITIVE ASSOCIATES, INC., :

Plaintiffs, :

-against- :

72 Civ. 1986

AKIYOSHI YAMADA, LAVENTHOL, KREKSTEIN, :  
HORWATH & HORWATH, MORTON DEAR, :  
ROBERT E. BIER, THOMAS MARTINO, JR., :  
TAKARA ASSET MANAGEMENT CORPORATION :  
and IRA N. SMITH, :

ANSWER OF DEFENDANTS  
DEAR, BIER AND MARTINO

Defendants. :

- - - - -x

Defendants Morton Dear, Robert E. Bier and Thomas  
Martino, Jr. by their attorneys, Christy, Frey & Christy, answer  
the complaint as follows:

1. Deny the allegations of paragraph "1" of the  
complaint.
2. Deny the allegations of paragraph "2" of the  
complaint except admit that certain allegations in the complaint  
herein are the same as, or similar to, certain allegations in the  
complaint in an action entitled Securities and Exchange Commission  
v. Everest Management Corporation, et al., 71 Civ. 4932 and  
respectfully refer to the latter complaint for the contents thereof.
3. Deny that they have knowledge or information suffi-  
cient to form a belief as to the truth of the allegations contained  
in paragraphs "3" and "4" of the complaint.

4. Admit the allegations contained in paragraphs "5", 26a "6", "7" and "8" of the complaint.

5. Deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "9" and "10" of the complaint.

6. Deny the allegations of paragraphs "11", "12", "13" and "14" of the complaint except admit that Lavanthol, Krekstein, Horwath & Horwath certified financial statements for Takara Partners for the period July 16, 1969 to December 31, 1969, which statements speak for themselves, and deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs "11", "12", "13" and "14" of the complaint insofar as they relate to defendants other than Dear, Bier and Martino.

7. With respect to paragraph "15" of the complaint, Dear, Bier and Martino repeat and reallege each and every denial of paragraph "6" of this answer with the same force and effect as if set forth more fully herein.

8. Deny the allegations of paragraph "16" of the complaint except deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph "16" of the complaint insofar as they relate to defendants other than Dear, Bier and Martino.

9. Deny that they have knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "17" through "23", inclusive, of the complaint.



FIRST AFFIRMATIVE DEFENSE

10. The complaint fails to state a claim against Dear, Bier and Martino upon which relief may be granted under Section 17(a) of the Securities Act of 1933 or Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, in that the alleged activities of Dear, Bier and Martino were not performed in connection with the purchase or sale of securities.

SECOND AFFIRMATIVE DEFENSE

11. The complaint fails to state a claim against Dear, Bier and Martino upon which relief may be granted under Sections 206(1) and (2) of the Investment Advisers Act of 1940.

THIRD AFFIRMATIVE DEFENSE

12. The complaint fails to state a claim against Dear, Bier and Martino upon which relief may be granted under applicable law with respect to breach of fiduciary obligations and fraud.

FOURTH AFFIRMATIVE DEFENSE

13. The Court lacks subject matter jurisdiction over the activities of Dear, Bier and Martino alleged in the complaint.

WHEREFORE, defendants Dear, Bier and Martino respectfully request that a judgment be entered herein dismissing the action as

against them, with costs and disbursements, and granting such further relief as the Court deems proper.

CHRISTY, FREY & CHRISTY

By 

A Member of the Firm  
45 Rockefeller Plaza  
Suite 2350  
New York, New York 10020

Attorneys for Defendants  
Dear, Bier and Martino



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COMPETITIVE CAPITAL CORPORATION and  
COMPETITIVE ASSOCIATES, INC.,

72 Civ. 1986

Plaintiffs

against

AKIYOSHI YAMADA, LAVENTHOL, KREKSTEIN,  
HORWATH & HORWATH, MORTON DEAR,  
ROBERT E. BIER, THOMAS MARTINO, JR.,  
TAKARA ASSET MANAGEMENT CORPORATION  
and IRA N. SMITH,

INTERROGATORIES TO  
PLAINTIFFS

Defendants.

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Defendant Laventhol, Krekstein, Horwath & Horwath,  
pursuant to Rule 33 of the Federal Rules of Civil Procedure,  
hereby requires plaintiffs by their duly authorized officers or  
agents to answer separately and fully, in writing and under  
oath, each and every one of the following interrogatories  
within 30 days after service thereof:

A. Identify and set forth the last known name  
and address of each and every corporate officer and each member  
of the Board of Directors of plaintiff Competitive Capital  
Corporation (hereinafter sometimes referred to as the "Fund  
Manager") and plaintiff Competitive Associates, Inc. (herein-  
after sometimes referred to as the "Fund") from February 20,  
1969 to date, together with the dates they occupied such  
directorships and offices.

B. State the name, present or last known address  
of each and every person (1) having knowledge of any facts

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alleged in the complaint, specifying the count of the complaint to which such facts relate, (2) who has been interviewed in connection with facts alleged in the complaint, specifying the count of the complaint to which such facts relate, (3) from whom any signed statement has been obtained, specifying the count of the complaint to which such statement relates and (4) upon whom plaintiffs intend to rely at the trial of this action, specifying the count of the complaint to which such evidence will relate.

C. Set forth the names of each and every portfolio manager selected to manage the assets of the Fund from the date of inception of the Fund through June 30, 1972.

D. With respect to each person listed in answer to Interrogatory "C", (1) state whether such person was selected by Competitive Capital Corporation and, if so, by which person or persons acting on behalf of Competitive Capital Corporation and (2) set forth the period of such person's employment as a portfolio manager.

E. Set forth the amount of compensation paid to (or accrued in favor of) Competitive Capital Corporation or any successor as Fund Manager from the inception of the Fund and the manner in which such compensation was calculated including the following:

1. Net Asset Value of a share at beginning of contract period;



2. Net Asset Value of a share at  
end of contract period;
3. Capital Gains Distributions  
made during contract period, treated as if re-  
invested;
4. Adjusted Net Asset Value per  
share at end of contract period (total of lines  
2 and 3;
5. Change in Net Asset Value per  
share during contract period (difference between  
lines 4 and 1);
6. Percentage Change (line 5/line 1);
7. Percentage Change of Standard  
& Poor's Index of 500 stocks;
8. Difference ("Spread") between  
lines 6 and 7;
9. Incentive Adjustment;
10. Base Fee;
11. Total Management Fee Accrued  
(sum of lines 9 and 10);
12. Management Fee Payable in fiscal  
year;
13. Carry Forward.

F. Set forth the amount of compensation paid to (or accrued in favor of) each portfolio manager listed in response to "Interrogatory C" for each year of his employment and the manner in which such compensation was calculated, including

1. the calculation of each portfolio manager's investment performance in the manner set forth in items "1" through "8" of "Interrogatory E" or such other manner employed by the Fund;

2. the proportion of the base fee paid or payable to each portfolio manager;

3. the proportion of the positive incentive adjustment paid or payable to each portfolio manager.

G. Set forth the value of all assets assigned to Takara Asset Management Corporation after it was retained to act as a portfolio manager of a portion of the portfolio of the Fund and the manner in which such value is computed.

H. Set forth the percentage of total assets and the percentage of allocable new assets represented by the amount given in response to "Interrogatory G" at the time such assets were allocated to Takara Asset Management Corporation and the manner in which such percentages have been computed.



I. Set forth the amount of cash and the amount, type and names of the securities and other assets assigned to Takara Asset Management Corporation by the Fund Manager.

J. Set forth each and every purchase or sale of a security or other asset by Takara Asset Management Corporation during the period it was employed as a portfolio manager together with

1. the date of each such purchase or sale;
2. the amount of securities or other assets bought or sold;
3. the price paid per unit;
4. the total price paid; and
5. if a sale, whether it resulted in a gain or loss and the amount thereof.

K. Set forth each and every security listed in response to "Interrogatory J" which plaintiffs will contend was "purchased at artificially inflated prices with little or no investment and for purposes of personal profit" as alleged in the complaint.

L. Set forth the Capitalization of Competitive Associates, Inc. as of February 20, 1969.

M. Set forth the total number of shares sold on the initial public offering, the underwriting discounts, the



proceeds to the Fund and the amount available for investment after the initial public offering.

N. Set forth the net asset value of the Fund as of the end of each quarter during its existence through June 30, 1972.

O. With respect to the allegations of paragraph "14" of the complaint, set forth the manner in which plaintiffs compute damages of \$6,000,000, including each item of damages suffered by each plaintiff.

Dated: New York, New York  
July 26, 1972

SHEA GOULD CLIMENKO & KRAMER

By Michael Leach

A Member of the Firm

Attorneys for Defendant Laventhol,  
Krekstein, Horwath & Horwath  
330 Madison Avenue  
New York, New York 10017

TO: LAWLER, STERLING & KENT, ESQS.  
Attorneys for Plaintiffs  
500 Fifth Avenue,  
New York, New York

CHRISTY, FREY & CHRISTY, ESQS.  
Attorneys for Defendants  
Dear, Bier and Martino  
45 Rockefeller Plaza,  
New York, New York

JOSEPH J. MARCHESO, ESQ.  
Attorney for Defendants  
Akiyoshi Yamada and  
Takara Asset Management Corporation  
45 Rockefeller Plaza  
New York, New York

PLAINTIFF ANSWERS TO INTERROGATORIES OF LAVENTHOL

35a

UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

COMPETITIVE CAPITAL CORPORATION and  
COMPETITIVE ASSOCIATES INC.,

Plaintiffs,

v.

CIVIL ACTION NO. 72-1986

AKIYOSHI YAMADA, LAVENTHOL, KREKSTEIN,  
HORWATH & HORWATH, MORTON DEAR,  
ROBERT E. DIER, THOMAS MARTINO, JR.,  
TAKARA ASSET MANAGEMENT CORPORATION  
and IRA N. SMITH,

Defendants.

PLAINTIFFS COMPETITIVE CAPITAL CORPORATION ("CCC") AND COMPETITIVE ASSOCIATES INC. ("CAI") ANSWERS TO DEFENDANT LAVENTHOL, KREKSTEIN, HORWATH & HORWATH'S INTERROGATORIES.

The Answers of Plaintiffs Competitive Capital Corporation and Competitive Associates Inc. are set forth below designated, unless otherwise noted, in the same fashion as the Interrogatories:

A. This question is objected to in so far as it calls for information about persons affiliated with CAI or CCC prior to June 20, 1970, as such information is not relevant to the subject matter of this proceeding.

The names and addresses of each and every corporate officer and each member of the Board of Directors of Competitive Capital Corporation, together with the dates they occupied such offices and directorships:

President: Richard E. Boesel, Jr., 67 West Shore Road, Belvedere, California 94920; September 17, 1969 to June 25, 1970.



J. Robert Randolph, 1900 Avenue of the Stars, Los Angeles, California 90067; June 25, 1970 to June 30, 1972.

Vice President:

Thomas Raychel, 18601 Hatteras, Tarzana, California; September 17, 1969 to July 17, 1970.

Michael Risan, 9601 Wilshire Boulevard, Beverly Hills, California 90210; June 25, 1970 to August 31, 1972.

Secretary:

Michael Risan, April 14, 1970 to September 15, 1971.

Alan R. Markizon, 9601 Wilshire Boulevard Beverly Hills, California 90210; September 15, 1971 to Present.

Treasurer:

Thomas Raychel, April 14, 1970 to July 17, 1970.

Walter W. Latimer, 9601 Wilshire Boulevard, Beverly Hills, California 90210, July 17, 1970 to Present.

Assistant Secretary:

Yolanda Victoria, 9601 Wilshire Boulevard, Beverly Hills, California 90210, April 14, 1971 to Present.

Directors:

Frank Vincent Deegan, 13456 Bayliss Road, Los Angeles, California 90049, April 14, 1970 to October 9, 1970.

Irwin Solomon, 9369 Lloydcrest Drive, Beverly Hills, California 90210; April 14, 1970 to April 14, 1971.

John A. Coe, Jr., P.O. Box 36, 9441 Washburn Road, Downey, California 90241; April 14, 1970 to September 15, 1971.

J. Robert Randolph, April 14, 1971 to June 30, 1972.

Alan R. Markizon, April 14, 1971 to Present.

Michael Risan, September 15, 1971 to Present.

The names and addresses of each and every corporate officer and each member of the Board of Directors of Competitive Associates Inc., together with the dates they occupied such offices and directorships:

President and Chairman of the Board:

Richard E. Boesel, Jr., March 26, 1969 to October 9, 1970.

J. Robert Randolph, October 9, 1970 to June 30, 1972.

Chairman of the Board:

J. Perry Smith, 9601 Wilshire Boulevard, Beverly Hills, California 90210; June 28, 1972 to Present.

Vice President:

Michael Risman, October 9, 1970 to August 31, 1972.

Secretary:

Michael P. Levitt, 44 Montgomery Street, San Francisco, California, February 2, 1970 to October 9, 1970.

Michael Risman, June 25, 1970 to October 9, 1970.

Alan R. Markizon, October 9, 1970 to Present.

Treasurer:

Thomas Raychel, September 18, 1969 to October 9, 1970.

Walter W. Latimer, October 9, 1970 to Present.

Assistant Secretary:

Alan R. Markizon, June 25, 1970 to October 9, 1970.

Assistant Treasurer:

Thomas Raychel, April 28, 1969 to June 25, 1970.

Walter W. Latimer, June 25, 1970 to October 9, 1970.

David J. Servente, 9601 Wilshire Boulevard, Beverly Hills, California 90210, June 25, 1970 to Present.

Directors:

Richard E. Boesel, Jr., February 23, 1969 to October 9, 1970.

James B. Barron, 132 Cedar Street, Braintree, Massachusetts 02184; October 9, 1970 to Present.

Henry Homes, Jr., River Road, Scarborough, New York 10510; October 9, 1970 to Present.

John W. Dominick, 175 Ocean Street, Lynn, Massachusetts, April 28, 1972 to Present.

Jerome Robert Randolph, October 9, 1970 to June 30, 1972.

Michael Risman, June 28, 1972 to Present.

J. Perry Smith, October 9, 1970 to Present.

Arthur J.C. Underhill, 241 Sixth Avenue, New York, New York, February 23, 1969 to Present.

B. Clifford McSwain  
13900 Fiji Way  
Marina Del Rey, California



All the persons listed in the Answers to Interrogatories "A" above have, to some extent, knowledge of the facts alleged in the Complaint; have participated in numerous discussions concerning the Complaint; and in the normal course of business have executed documents which may be construed to be "statements" and Plaintiffs may call any or all of them as witnesses in the trial. Plaintiff does not know, at this time, all of those parties who may have witnessed facts and who may testify at trial.

C. The names of Portfolio Managers selected to manage assets of the Fund, CAI, from date of the Fund's inception through June 30, 1972:

Atalanta Asset Management Corporation  
Forstmann-Leff Management Co., Inc.  
Gibraltar Research and Management Company  
Lockton Management Company, Inc.  
Takara Asset Management Corporation  
Shaw Management Company, Inc.  
Competitive Capital Corporation

1) As a Portfolio Manager, subject to the supervision of committee of uninterested, unaffiliated members of the Fund's Board of Directors.

2) As an Investment Adviser.

D. Takara Asset Management Corporation ("Takara") was recommended by CCC to the Board of Directors of CAI for selection as a Portfolio Manager. Jerome Robert Randolph, then President of CCC, had the primary responsibility for such selection. Takara was a Portfolio Manager for CAI from October 12, 1970 to May 14, 1971.

Shaw Management Company, Inc. ("Shaw") was recommended by CCC to the Board of Directors of CAI for selection as a Portfolio Manager. Jerome Robert Randolph, then President of CCC, had the primary responsibility for such selection. Shaw was a Portfolio Manager of CAI from October 12, 1970 to May 7, 1972.

Competitive Capital Corporation:

1) CCC was not selected by CCC to manage the assets of the Fund.

2) CCC acted as Investment Adviser, without compensation, under the supervision of a Committee of the "uninterested/unaffiliated" Directors of the Fund between May 14, 1971 and February 7, 1972.

Further, CCC has been the Investment Adviser to the Fund from February 7, 1972 to the present.

As to the remainder of the Portfolio Managers listed in Interrogatory "C" the Plaintiffs object to the question the grounds that it is not relevant to the subject matter of this litigation.

E. The amount of compensation paid to CCC as a Fund Manager from the inception of the Fund until June 30, 1972 was \$62,045.

The information by which the Defendants may calculate the remaining Answers to Interrogatory "E" has been provided in the Plaintiffs' submissions in response to the Defendants' Request to Produce. To the extent that such information has not been supplied in that response it is available at the offices of CCC and CAI at 9601 Wilshire Boulevard, Beverly Hills, California 90210, and will be made available to counsel for the Defendants during normal business hours upon reasonable notice and request. To compile the information in the form requested in this Interrogatory would unduly burden the staff of the Plaintiffs.

F. During its tenure as a Portfolio Manager, Takara Asset Management Corporation received \$11,404 as compensation.

During its tenure as a Portfolio Manager, Shaw Management Company received \$26,702 as compensation.



As to the remaining Portfolio Managers listed in Interrogatory "C" the Plaintiffs object to this Interrogatory on the grounds that it is not relevant to the subject matter of this litigation.

The information by which the Defendants may calculate the remaining Answers to Interrogatory "F" has been provided in the Plaintiffs' submissions in response to the Defendants' Request to Produce. To the extent that such information has not been supplied in that response it is available at the offices of CCC and CAI at 9601 Wilshire Boulevard, Beverly Hills, California 90210, and will be made available to counsel for the Defendants during normal business hours upon reasonable notice and request. To compile the information in the form requested in this Interrogatory would unduly burden the staff of the Plaintiffs.

G. The value of assets assigned to Takara Asset Management Corporation on September 12, 1970 was \$10,443,348.00. Listed securities are valued at their last sales price on the applicable exchange or at the mean between bid and asked, if no sale was made. Unlisted securities are valued at the mean between bid and asked. Securities not currently quoted are valued at fair value determined in good faith by the Board of Directors. Open short positions will be taken into account at the actual realizable value thereof. From this sum there is deducted the aggregate amount of liabilities and accrued expenses to produce the total net asset value. Other assets, including restricted securities, are valued by the Board of Directors in good faith at fair value.

H. The assets of CAI were allocated 50% to Takara Asset Management Corporation on October 12, 1970. There were no new allocation assets subsequent to that time. The CAI portfolio was divided in equal parts between Takara and Shaw.

I. See Schedule A.

J. Copies of the securities ledger sheets for the Takara portion of the portfolio of CAI is being supplied in response to Request to Produce, No. 14 made by the Defendants and the information requested in Interrogatory "J" is contained in those securities ledger sheets.

K. Upon information and belief:

Children's World, Inc.;  
 Fantastic Fudge, Inc.;  
 International Health Sciences, Inc.;  
 Firefly Enterprises, Inc.;  
 Visual Sciences, Inc.;  
 Digital Technology (Units);  
 Galco Leasing Systems;  
 Marketing Resources and Applications;  
 Richard Packing, Inc.;  
 Optotronics Systems;  
 Paris Enterprises  
 Regal Crest, Inc.;  
 Sovereign American Arts; and  
 Synchronex Corporation.

Plaintiffs in this matter do not now have knowledge of which other securities in Takara's portfolio were purchased at inflated prices but believe that discovery will provide such information.

L. The initial capitalization of CAI on February 20, 1969 was 13,108 shares of \$1 par value common stock issued for \$239,871 in cash.

M. The total number of shares sold on the initial public offering, the underwriting discounts, the proceeds to the Fund and the amount available for investment after the initial public offering:

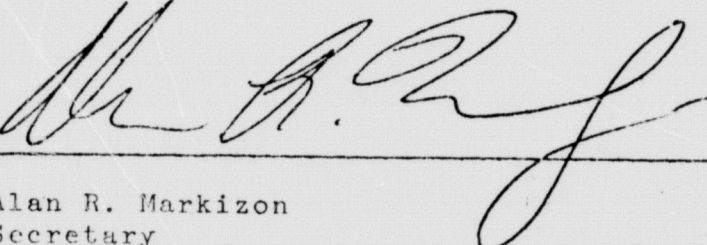
Shares	2,601,534
Underwriting Discounts	\$4,422,608
Proceeds to the Fund and available for investment	47,645,946



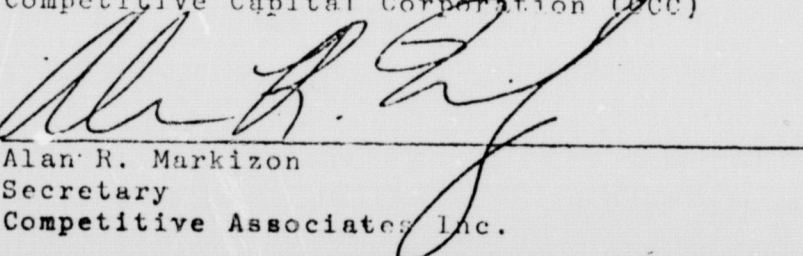
N. Net asset value of the Fund as of the end of each Quarter during its existence through June 30, 1972:

6/30/69	16.56	3/31/71	10.01
9/30/69	15.43	6/30/71	8.19
12/31/69	14.99	9/30/71	7.40
3/31/70	13.37	12/31/71	6.76
6/30/70	7.71	3/31/72	7.44
9/30/70	8.75	6/30/72	6.52
12/31/70	8.84		

O. In addition to the decrease in the value of assets under Takara's management, as a result of its activities and those of others, both CCC and CAI suffered loss of prestige and business reputation. The compensation paid to CCC by CAI which is based partly on the investment performance and partly on the net assets of CAI, was lessened as a result of the actions of Defendants. Sales of CAI shares were adversely affected and redemptions increased which, in addition to being harmful to CAI, further reduced the compensation paid to CCC. In addition, the actions of Defendants complained of in this case were a necessary element of a far larger conspiracy to defraud CAI and CCC who suffered actual damages of approximately \$5,000,000. It is the contention of Plaintiffs that Defendants are jointly and severally liable for full tort damages suffered by CAI and CCC.



Alan R. Markizon  
Secretary  
Competitive Capital Corporation (CCC)



Alan R. Markizon  
Secretary  
Competitive Associates Inc.

Notary Seal

Subscribed and sworn to before me  
this 5th day of September, 1972.

Brenda Canin  
Notary Public





TAKARA ASSET MANAGEMENT CORPORATIONSCHEDULE OF INVESTMENTS AT MARKET VALUE ALLOCATED AT OCTOBER 12, 1970

	<u>Shares</u>	<u>Market</u>
American Reserve Corp.	5,000	\$202,500
American Reserve Deb. 6% 90	87.5	88,375
American Investment Corp.	4,000	42,500
American South Africa Inv.	2,000	92,500
Barton's Candy Corp.	4,500	36,562
Belco Petroleum	4,500	87,187
Bradford Computer & Systems	1,750	37,187
Burlington Industries	2,000	82,500
CNA Financial Corp.	1,650	27,225
Chemical New York Corp.	600	35,925
Eastern Gas & Fuel	2,500	80,000
E. G. & G. Inc.	3,500	52,500
Extendicare	2,500	55,000
Federal National Mortgage Association	1,500	80,625
Financial Corp. of Santa Barbara	5,000	103,125
First Charter Financial	500	20,437
Four Seasons Equity Corp.	5,625	3,943
Four Seasons Nursing Centers of America, Inc.	15,000	10,500
Franklin Store Corp.	2,000	32,250
Gilbralter Financial	950	19,000
Horizon Corp.	3,000	83,625
Hospital Corp. of America	150	3,487
Integrated Resources	1,000	34,500
International Telephone & Telegraph	5,000	224,375

## SCHEDULE A - Continued

TAKARA ASSET MANAGEMENT CORPORATIONSCHEDULE OF INVESTMENTS AT MARKET VALUE ALLOCATED AT OCTOBER 12, 1970

	<u>Shares</u>	<u>Market</u>
Kenton Corp.	7,000	\$116,375
Kinney National Service	2,500	70,937
KLM Royal Dutch Airlines	1,500	68,812
Land Resources	4,750	21,375
Lincoln National Corp.	750	50,156
Masonite Corp.	1,000	44,000
MCA Inc.	7,000	166,250
Middle South Utility	2,000	46,250
Murphy Oil Corp.	1,400	39,025
National Data Corp.	500	66,000
Natomas Co.	1,500	80,062
Northern & Central Gas	4,000	56,500
Northwestern Airlines Inc.	4,500	87,187
Philips Petroleum	4,000	118,000
Pocono Carriage Estates	5,150	41,200
Revenue Properties	50,550	30,228
Rhiengold Corp.	7,500	176,250
SEDCO Inc.	4,000	98,000
Sonderling Broadcasting 5-1/4% 88	40M	26,450
Southwest Forest Industries	4,500	76,500
Sterling Drug, Inc.	1,200	44,250
Teledyne Inc.	9,700	203,700
Teleprompter Corp.	1,500	109,500
Telex	7,500	155,625
Texaco	2,500	80,312
Texaco Eastern Transmission	3,100	110,050
Tishman Realty & Construction	1,000	17,625



TAKARA ASSET MANAGEMENT CORPORATIONSCHEDULE OF INVESTMENTS AT MARKET VALUE ALLOCATED AT OCTOBER 12, 1970

	<u>Shares</u>	<u>Market</u>
Thomas Industries	500	9,125
Turbodyne Corp.	1,000	29,625
Union Electric Co.	5,000	90,000
Upjohn Co.	1,000	50,000
Wells, Rich, Greene, Inc.	5,500	67,375
Western Financial Corp.	1,500	24,000
Yellowknife Bear Mines Inc. Ltd.	20,000	115,000
Total Investments at Market Value		<u>\$4,121,572</u>
<u>Short Positions</u>		
Itek Corp.	500	\$ 16,625
Ling-Temco-Vought, Inc.	1,250	<u>19,687</u>
		<u>\$ 36,312</u>
Investments at market value		\$ 4,120,149
Commercial Paper		2,794,309
Cash		755,840
Receivable for securities sold		2,759,571
Dividends and Interest receivable		13,479
Total Assets		<u>\$10,443,348</u>

AFFIDAVIT OF SERVICE

I certify that I mailed copies of the attached Answers to Interrogatories on September 5, 1972 to the following:

Shea, Gould, Climenko & Kramer, Esqs.  
330 Madison Avenue  
New York, New York 10017

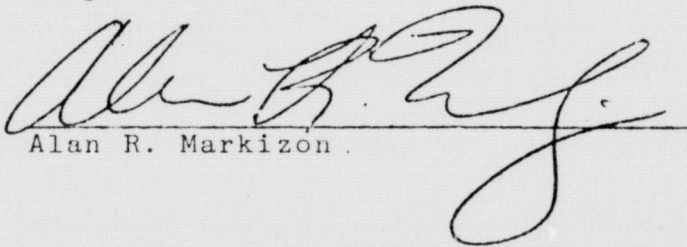
Attorneys for Defendant Laventhol,  
Krekstein, Horwath & Horwath

Christy, Frey & Christy, Esqs.  
45 Rockefeller Plaza  
New York, New York

Attorneys for Defendants, Morton  
Dear, Robert E. Bier, and Thomas  
Martino, Jr.

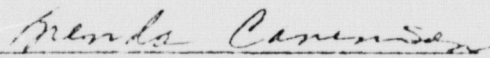
Joseph J. Marcheso, Esq.  
45 Rockefeller Plaza  
New York, New York

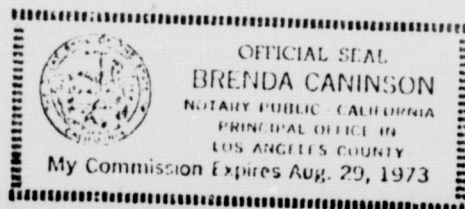
Attorney for Defendants Akiyoshi  
Yamada and Takara Asset Management  
Corporation.

  
Alan R. Markizon

Notary Seal

Subscribed and sworn to before me this 5th day of September 1972.

  
Notary





UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

COMPETITIVE CAPITAL CORPORATION and	)	Index No. 72 Civ. 1986
COMPETITIVE ASSOCIATES, INC.,	)	(T.P.G.)
	)	
Plaintiffs	)	
	)	
against	)	
	)	
AKIYOSHI YAMADA, LAVENTHOL, KREKSTEIN,	)	
HORWATH & HORWATH, MORTON DEAR, ROBERT	)	DEFENDANT LKH&H'S
E. BIER, THOMAS MARTINO, JR., TAKARA	)	MOTION FOR SUMMARY
ASSET MANAGEMENT CORPORATION and	)	<u>JUDGMENT</u>
IRA N. SMITH,	)	
	)	
Defendants.	)	
	)	
	)	

S I R S :

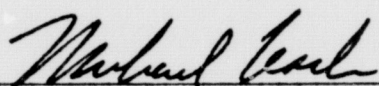
PLEASE TAKE NOTICE that upon the affidavit of Michael Lesch, sworn to on February 26 , 1974, and the exhibits annexed thereto, and upon the pleadings and all prior proceedings had herein, the undersigned will move this Court before the Hon. Thomas P. Griesa, United States District Judge, in Room 501 , on the 13 day of March, 1974, at M. of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56, Fed. R. Civ. P., granting summary judgment in favor of defendant Laventhol, Krekstein, Horwath & Horwath ("LKH&H") and dismissing the complaint herein on the ground that the pleadings, depositions and other undisputed facts herein show that there is no genuine issue as to any material fact and that defendant LKH&H is entitled to judgment as a matter of law; and for such other and further relief as to

this Court may seem just and proper.

Dated: New York, New York  
February 27, 1974

Yours, etc.

SHEA GOULD CLIMENKO & KRAMER

By   
A Member of the Firm

Attorneys for Defendant Laventhol,  
Krekstein, Horwath & Horwath  
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New York, New York 10017

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Robert E. Bier and Thomas Martino, Jr.  
45 Rockefeller Plaza  
New York, New York

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Attorneys for Ira N. Smith  
10 East 40th Street  
New York, New York



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

COMPETITIVE CAPITAL CORPORATION and  
COMPETITIVE ASSOCIATES, INC.,

72 Civ. 1986

Plaintiffs,

against

AKIYOSHI YAMADA, LAVENTHOL, KREKSTEIN,  
HORWATH & HORWATH, MORTON DEAR,  
ROBERT E. BIER, THOMAS MARTINO, JR.,  
TAKARA ASSET MANAGEMENT CORPORATION  
and IRA N. SMITH,

AFFIDAVIT IN  
SUPPORT OF LKH&H'S  
MOTION FOR SUMMARY  
JUDGMENT

Defendants.

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) SS:

MICHAEL LESCH, being duly sworn, deposes and says:

1. I am a member of the firm of Shea Gould  
Climenko & Kramer, attorneys for defendant Laventhol, Krekstein,  
Horwath & Horwath (referred to hereinafter as "LKH&H"), and  
submit this affidavit in support of said defendant's motion,  
pursuant to Fed.R.Civ.P., Rule 56, for summary judgment in  
favor of defendant LKH&H, on the ground that the pleadings,  
depositions and answers to interrogatories herein show that  
there is no genuine issue as to any material fact and that  
defendant LKH&H is entitled to judgment as a matter of law.

THE PLEADINGS

2. The complaint herein (a copy of which is  
annexed hereto marked "Exhibit A") alleges that plaintiffs, a  
fund manager known as Competitive Capital Corporation ("Competi-

tive Capital") and a mutual fund known as Competitive Associates, Inc. ("Competitive Associates"), sustained damages of \$6,000,000 as a result of their employment of defendants Akiyoshi Yamada ("Yamada") and Takara Asset Management Corporation ("Takara Management") from October 1970 through May 1971 when they acted as portfolio managers of a portion of plaintiffs' assets. The complaint alleges in five un-numbered counts that defendants violated § 17(a) of the Securities Act of 1933, § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, §§ 206(1) and (2) of the Investment Advisers Act and fiduciary duties imposed by common law.

3. The only misconduct charged to LKH&H is that in "early 1971" it "disseminated or caused to be disseminated to Competitive Capital and Competitive Associates, financial statements for Takara Partners" (Ex. A, par. 11) which were certified by LKH&H and were allegedly false and misleading (Ex. A, pars. 11-16).

4. After an introductory section setting forth the Court's jurisdiction and the identity of the parties, the complaint is separated into five un-numbered counts: one count describes the false representations of Takara Management and Yamada to obtain employment in June 1970, their retention in October 1970 and their maladministration and fraudulent conversion of the plaintiffs' assets from October 1970 to May 1971 (Ex. A, pars. 17-19, un-numbered Count III); two counts



appear to allege\* that Takara Management and Yamada were retained in reliance on defendant LKH&H's allegedly false financials of Takara Partners disseminated to plaintiffs in "early 1971" (Ex. A, pars. 11-16, un-numbered Counts I and II); and two counts describe efforts of Yamada, Takara Management and Smith in January 1971 and thereafter to conceal wrongdoings of Yamada (Ex. A, pars. 20-23, un-numbered Counts IV and V). LKH&H is named as a defendant only in the two counts described in paragraphs 11 through 16 of the complaint.

5. In its answer (a copy of which is annexed hereto marked "Exhibit B") LKH&H admits the allegations with respect to the identities of LKH&H, Dear, Bier and Martino, admits that it certified financial statements for Takara Partners for the period July 16, 1969 to December 31, 1969, denies that

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\* We use the expression "appear to allege" because nowhere in either of the counts wherein LKH&H is named as a defendant do plaintiffs allege any facts from which it could be inferred that any damages suffered by plaintiffs resulted from any misrepresentations of defendant LKH&H. For example, it is not claimed that plaintiffs invested \$6,000,000 in Takara Partners or loaned \$6,000,000 to that firm in reliance on the financials certified by LKH&H. However, in the third un-numbered count, (wherein LKH&H is not named as a defendant) after alleging that Yamada made certain misrepresentations as to the assets of Takara Partners and Armstrong Investors (Ex. A, par. 17), plaintiffs allege that in reliance thereon "defendants Yamada and Takara Management were employed to manage approximately \$8,500,000 of the assets of Competitive Associates" (Ex. A, par. 18). Accordingly, reading the complaint most favorably to the plaintiffs, we assume that that is the causal nexus plaintiffs meant to allege in the counts wherein LKH&H is named as a defendant.

such statements were false and denies knowledge or information sufficient to form a belief as to the remaining material allegations of the complaint.

PRIOR PROCEEDINGS

6. On April 25, 1973 and October 24, 1973, defendant LKH&H took the deposition of plaintiffs by Alan R. Markizon, an officer of plaintiffs throughout the period in issue. In addition, plaintiffs have served answers dated September 25, 1973 to interrogatories propounded by LKH&H.

FACTS IN SUPPORT  
OF THIS MOTION

7. I believe that none of the facts hereinafter set forth are in dispute. They are based entirely upon (1) Mr. Markizon's testimony at pretrial depositions herein, (2) plaintiffs' answers dated September 25, 1973 to the Interrogatories of defendant LKH&H and (3) the testimony of J. Robert Randolph, president of plaintiffs at all relevant times herein, in proceedings before the Securities and Exchange Commission on May 10, 1971. Rather than burden the Court with copies of transcripts of the entire testimony of Messrs. Markizon and Randolph, the exhibits then marked and plaintiffs' responses to interrogatories, I have quoted relevant material and set forth in parenthesis references to the underlying documents for all statements



of fact.\* Should there be any dispute as to the accuracy of 54a such references or should the Court request copies of the relevant underlying documents, they will be furnished to the Court.

8. Competitive Associates is and was in 1970 and thereafter an open-end mutual fund whose securities were selected for the purchase and sale by portfolio managers (Markizon 14-15). Competitive Capital is and was in 1970 and thereafter, Competitive Associates' fund manager (Markizon 11). As such, it selected the fund's portfolio managers, maintained its books and records, and purchased the securities selected by the portfolio managers (Markizon 15).

9. In April 1970, Competitive Capital determined that the portfolio managers of Competitive Associates ought to be changed (Randolph 14). Randolph interviewed prospective portfolio managers, among them Yamada (Randolph 13-14) and recommended replacements to the Board of Directors of Competitive Associates (Randolph 9-10).

10. Yamada told Randolph about Takara Partners, an investment partnership which he managed, and that he managed an off-shore fund (Randolph 15-19). Yamada also gave Randolph a letter dated June 12, 1970 (a copy of which is annexed hereto marked "Exhibit C") which stated, inter alia, the results and

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\* Numbers in parentheses preceded by "Markizon" refer to pages of the transcript of the deposition of Alan R. Markizon taken by LKH&H; numbers following "Markizon Ex." refer to the numbers of exhibits marked for identification during Markizon's deposition. Numbers preceded by "Randolph" refer to pages of the (Continued)

financial position of Takara Partners (Markizon Ex. 1; Randolph Ex. 2; Randolph 13); that Takara Partners had \$6,000,000 in assets; that its net assets had increased by 14.3% in 1969; that Yamada also managed a certain Armstrong Investors; and that it had assets in excess of \$8,000,000 (Randolph Ex. 2; Markizon Ex. 1). In addition, Yamada provided Randolph with a prospectus of Armstrong Investors (Randolph 23). 55a

11. Based on his interviews with Yamada and Yamada's letter, Randolph prepared a write-up of Yamada. He also prepared write-ups of the other persons whom he determined to recommend to the Board of Directors of Competitive Capital and presented the write-ups to the Board (Randolph Ex. 1; Markizon Ex. 5; Randolph 23-4). Randolph did not check the final figures given him by Yamada and included them in the write-up he presented to the Board (Randolph 32).

12. On June 25, 1970, the day the write-up about Yamada was presented to the Board of Directors, it was annexed to the minutes of the meeting (Markizon Ex. 3, p. 1). Randolph's recommendations were discussed and Yamada's selection as a portfolio manager was approved by the Board (See Markizon Ex. 3, p. 2). The financial statements of Takara Partners (Markizon Ex. 4; copy annexed hereto marked "Exhibit D") were not presented at the Board meeting nor was the name of LKH&H mentioned (Markizon 52, 186-7).

transcript of the testimony of J. Robert Randolph given in an appearance before the Securities and Exchange Commission on May 10, 1971. Numbers followed by "Randolph Ex." refer to the numbers of exhibits marked at the time of Mr. Randolph's testimony. Numbers followed by "Interrog. Ans." refer to pages of plaintiffs' answers dated September 5, 1972, to interrogatories served herein by LKH&H.



13. Mr. Markizon testified as follows with respect to the discussion at the June 25, 1970 Board meeting at which the write-up on Yamada was submitted to the Board of Directors by Randolph (Markizon 126-7):

"Q. No one asked for the source of the statement that Takara was up 14.3 per cent in 1969; is that correct?

A. That's correct.

Q. And nobody asked for the source of the statement that Takara was presently up 5.3 per cent for 1970; is that correct?

A. I cannot recall anybody asking for that.

Q. And nobody asked for the source of the statement that it had six million dollars in assets; is that correct?

A. That's correct.

Q. And nobody asked for the source of any other financial information with respect to Takara Partners; is that correct?

A. To the best of my recollection, that is correct."

14. On October 9, 1970, Randolph was authorized by the Board of Directors to execute a portfolio manager's contract with Yamada (Markizon Ex. 19, p. 3). Between June 25, 1970 and October 12, 1970, no further investigation was conducted by anyone on behalf of plaintiffs (Markizon 131-2). No one on behalf of plaintiffs other than Randolph did any work whatsoever with respect to the retention of Yamada (Markizon 91-2).

15. Yamada was employed as portfolio manager of Competitive Associates for seven months from October 12, 1970

16. Plaintiffs claim herein that they suffered losses of \$6,000,000 resulting from mismanagement of the securities entrusted to the control of Yamada and Takara Management, \$5,000,000 of which is attributed by plaintiffs to "the decrease in the value of assets under Takara Management's management" and \$1,000,000 to "loss of prestige and business reputation" (Interrog. Ans., pp. 6-7).

17. As shown above, plaintiffs' claim of damages is predicated upon the misconduct of Yamada and Takara Management during their management of a portion of plaintiffs' portfolio. Accordingly, the only possible basis for plaintiffs' claims against LKH&H is that plaintiffs relied on the financial statements certified by LKH&H in retaining (or not terminating) Mr. Yamada and Takara Management. The testimony of plaintiffs' officers in this action and before the Securities and Exchange Commission conclusively establishes that plaintiffs did not and, indeed, could not, have relied on those financial statements in connection with the decision to employ, or continue the employment of, Yamada or Takara Management because they did not even see such financial statements until the time that Yamada and Takara Management ceased to be employed by plaintiffs.

18. Thus, Mr. Randolph testified before the SEC on May 10, 1971, four days before Yamada and Takara Management were terminated by plaintiffs. At that time, Randolph was



shown the certified financials of Takara Partners (Yamada Exhibit No. 24 before the Securities and Exchange Commission; Markizon Ex. 4) and testified that he had never seen them before (Randolph 40):

58a

"Q. I will show you a document which has previously been marked as Yamada Exhibit No. 24 as of May 5, 1971. Have you ever seen that document?

For the record, I think on some occasions the first five or seven pages of this have been circulated separately. We are not certain of the back-up materials.

A. I have not seen that.

Q. Well, review it and then make a statement on it.

MR. GREEN: Let's go off the record.

(Discussion off the record.)

MR. RODE: On the record.

THE WITNESS: I have not seen that document.

MR. RODE: That is Yamada Exhibit No. 24 of May 5, 1971, which is the '69 year-end statement for Takara Partners.

BY MR. RODE:

Q. Did you see anything comparable, any kind of a balance sheet?

A. No."

19. Alan R. Markizon, the secretary of both plaintiff corporations, admitted that he had no knowledge of any basis for the allegation in the complaint that the Takara Partners' financials certified by LKH&H had been "disseminated" to plaintiffs in "early 1971" (Ex. A, par. 11) as follows

(Markizon 146-7):

"Q. Now I direct your attention to Paragraphs 11 through 13 of the complaint, and ask you, when, in 1971, were the financial statements for Takara Partners disseminated to Competitive Capital and Competitive Associates?

A. I don't know.

Q. Who, at plaintiffs, would know the answer to that?

A. I don't know who would know that.

Q. Well, who would know whether or not they are still employed by Competitive Capital and Competitive Associates?

A. I said, I don't know.

Q. Just so that you understand my question, do you know of any person, whether or not he is now employed by Competitive Capital and Competitive Associates, or was employed by Competitive Capital and Competitive Associates in 1971, who would know the answer to the question, when in 1971 were the financial statements for Takara Partners disseminated to Competitive Capital and Competitive Associates?

A. Randolph would be the only person who might know that.

Q. To your knowledge, did anyone at Competitive Associates see the financial statements for Takara Partners prior to June 1971?

A. Not to my knowledge.

\* \* \*

Q. Did anyone employed by or associated with Competitive Capital see the financial statements for Takara Partners prior to June 1971?

A. Not to my knowledge."



20. Mr. Markizon further testified that Mr. Randolph was the person primarily responsible for hiring Yamada and Takara Management and the only person who did any work whatsoever in connection therewith (Markizon 91-2):

"Q. Was there any group of individuals who did most of the work in connection with the hiring or retaining of Mr. Yamada?

A. Not on behalf of Associates, no.

Q. Are you saying that it was on behalf of Competitive Capital Corporation that this was done?

A. That's right.

Q. All right. Then will you tell me who the individual was on behalf of Competitive Capital Corporation?

A. J. Robert Randolph.

Q. He was primarily responsible for conducting the investigation in connection with the retention of Mr. Yamada; is that right?

A. That's correct.

Q. And was there anyone else who did work in connection with the retention of Mr. Yamada?

A. No, I think it shall be clear that the firm of Takara Asset Management Corp. was retained, although Yamada was the sole -- the sole shareholder.

Q. Was there anyone other than Mr. Randolph who did any work whatsoever in connection with retaining Mr. Yamada or his firm, Takara Asset Management Corporation?

A. No."

21. Nor can liability of LKH&H be predicated upon a connection between the figures contained in Yamada's letter (Exhibit C hereto) and the financials certified by LKH&H (Exhibit D hereto). The entire reference to Takara Partners'

financial position in Yamada's letter is as follows:

"We presently manage a domestic partnership with \$6 million in assets called Takara Partners. Takara was up 14.3% in 1969, and it is presently up 5.3% for 1970."  
(Exhibit C)

None of the assertions in Yamada's letter with respect to Takara Partners' assets appears on the financial statements certified by LKH&H. On the contrary, first, the financial statements certified by LKH&H show that at December 31, 1969, Takara Partners had total assets of \$4,248,612 (Exhibit D, p. 2), not \$6,000,000 as stated by Yamada. Second, based on the reported income of \$452,343 (Exhibit D, p. 3), the foregoing asset figure represents an increase in 1969 of 11.9%\*, not 14.3% as stated by Yamada. Third, Yamada's reference to Takara Partners' performance for 1970 could not have been taken from Exhibit D which only covers the period July 16, 1969 (inception) to December 31, 1969.

22. Moreover, Yamada's letter is not in the form of a financial statement, it does not suggest that it is based on audited figures, and it makes no mention of defendant LKH&H or any other accounting firm. There is, in short, not a scintilla of evidence that plaintiffs relied on the certification of any accountant or that any certified financial statements caused

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\* The percentage was calculated by reducing the total asset figure (\$4,248,612) at December 31, 1969, by the reported net income (\$452,343) to reach a base figure (\$3,796,269) and by ascertaining the percentage which the reported net income bears to the base figure ( $452,343 / 3,796,269 = 11.9\%$ ).



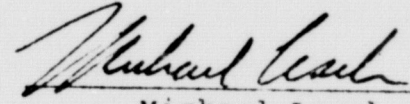
plaintiffs to hire or retain Yamada.

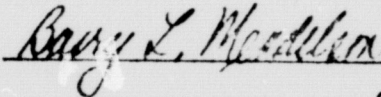
\* \* \*

23. In sum, the evidence adduced from plaintiffs in this action and in testimony before the Securities and Exchange Commission establishes that there is no causal connection between any act or omission of LKH&H and any damage which plaintiffs may have sustained. The only document referred to in the two counts of the complaint wherein LKH&H is named as a defendant is the financial statement of Takara Partners for the period from July 16, 1969 (inception) to December 31, 1969 (Ex. A, pars. 11-13). The only damages claimed are those resulting from decrease in the value of Competitive Associates' portfolio and associated "loss of prestige" resulting from improper management of the portfolio by Yamada and Takara Management (Interrog. Ans., pp. 6-7). And it is clear from the evidence set forth above that plaintiffs could not have relied on the Takara Partners' financial statement in employing Yamada and Takara Management because no one connected with employing Yamada and Takara Management even saw the Takara Partners' financial statement until the time that Yamada and Takara Management were terminated by plaintiffs. For this reason, as explained more fully in the memorandum submitted herewith, there is no basis for the assertion of liability against LKH&H in this action.

WHEREFORE, it is respectfully requested that defendant LKH&H's motion for summary judgment be granted in all respects.

Sworn to before me this  
26<sup>th</sup> day of February, 1974

  
Michael Lesch



BARRY E. MENDELSON  
Notary Public, State of New York  
No. 042447-75  
Qualified in New York County  
Certificate filed in New York County  
Commission Expires March 10, 1974



## EXHIBIT "A"

Exhibit A to Motion of Laventhol, Krekstein is a copy of the Complaint herein. That Complaint is included in this Appendix at p. 11a, supra.

## EXHIBIT "B"

Exhibit B to Motion of Laventhol, Krekstein is a copy of the Answer of Laventhol herein. That Answer is included in this Appendix at p. 21a, supra.



June 12, 1970

EXHIBIT "C"

66a

Mr. Jerry Randolph  
Chancellor Management Corp.  
1900 Avenue of the Stars  
Los Angeles, California 90067

Dear Jerry:

We very much appreciate your considering my partner John Galanis and myself as managers for a segment of Competitive Capital Fund. As you know, we are private money managers and do not at present manage public funds. We therefore have no printed brochure to make available to you in explaining our organization. However, I would like to outline it briefly for you.

(We presently manage a domestic partnership with \$6 million in assets called Takara Partners. Takara was up 14.3% in 1969, and it is presently up 5.3% for 1970. We also manage Armstrong Investors, S.A., an offshore fund with assets in excess of \$8 million. The fund commenced operations on February 15 of this year with a net asset value of \$20.00 per share. Its net asset value is now \$21.64 or up 8.5%. We also manage several private accounts totaling slightly over \$8 million. Takara Partners is a partnership of which both John Galanis and I are General Partners, and Mr. John L. Burns, former Chairman of the Board of Cities Service, is a special Limited Partner. A list of other limited partners of Takara Partners is attached as is a prospectus of Armstrong Investors, S.A. Armstrong Investors and our private accounts are managed by Everest Management Corp., an unregistered investment advisor of which John and myself are the principal stockholders. A biographical sketch of the principal people of our organization including John and myself is available on pages 4 and 5 of the Armstrong prospectus.

Again let me reiterate my thanks for your considering using us as possible managers for Competitive Capital Fund.

Sincerely,

AKIYOSHI YAMADA

AY/mm

Job stl  
Hire full

basic posture  
clean! style time  
connect too early.

g. 11

*Handwritten:* E.C.P. Vol. V-7

EXHIBIT "D"  
TAKARA PARTNERS

67a

JULY 16, 1969 (INCEPTION) TO DECEMBER 31, 1969

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## LAVENTHOL KRIEKSTEIN HORWATH &amp; HORWATH

CERTIFIED PUBLIC ACCOUNTANTS

723 HIGHWAY 10  
POST OFFICE BOX 11  
EAST BRUNSWICK, N.J. 08816  
IN N.J. 201-257-6000  
IN N.Y. 212-227-2738

OFFICES THROUGHOUT THE WORLD

TO THE GENERAL PARTNERS OF  
TAKARA PARTNERS  
NEW YORK, NEW YORK

WE HAVE EXAMINED THE BALANCE SHEET OF TAKARA PARTNERS (A LIMITED PARTNERSHIP) AS AT DECEMBER 31, 1969, AND THE RELATED STATEMENTS OF INCOME AND PARTNERS' EQUITY FOR THE PERIOD FROM JULY 16, 1969 (INCEPTION) TO DECEMBER 31, 1969. OUR EXAMINATION WAS MADE IN ACCORDANCE WITH GENERALLY ACCEPTED AUDITING STANDARDS, AND ACCORDINGLY INCLUDED SUCH TESTS OF THE ACCOUNTING RECORDS AND SUCH OTHER AUDITING PROCEDURES AS WE CONSIDERED NECESSARY IN THE CIRCUMSTANCES. THE INVESTMENTS IN RESTRICTED SECURITIES WERE VALUED AS PER APPRAISALS BY INVESTMENT BANKERS SELECTED BY YOU AND WERE CONFIRMED DIRECTLY TO US.

IN OUR OPINION, THE FINANCIAL STATEMENTS REFERRED TO ABOVE, PRESENT FAIRLY THE FINANCIAL POSITION OF TAKARA PARTNERS AT DECEMBER 31, 1969 AND THE RESULTS OF ITS OPERATIONS FOR THE PERIOD FROM JULY 16, 1969 (INCEPTION) TO DECEMBER 31, 1969 IN CONFORMITY WITH GENERALLY ACCEPTED ACCOUNTING PRINCIPLES.

*Laventhal Kriekstein Horwath + Horwath*

MARCH 23, 1970

## TAKARA PARTNERS

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## BALANCE SHEET - DECEMBER 31, 1969

## ASSETS

## CURRENT ASSETS:

CASH

\$ 55,699

## RECEIVABLES:

BROKERS (NOTE 2)

\$ 203,678

LOAN TO DEVON INTERNATIONAL

145,180

DIVIDENDS AND INTEREST

12,348

361,206

INVESTMENTS (AT MARKET AND APPRAISAL VALUES),  
(NOTES 1 AND 2):

MARKETABLE AND RESTRICTED

SECURITIES (COST \$3,029,036)

\$3,287,514

CALL OPTIONS (COST \$226,000)

113,063

PUT OPTIONS AVAILABLE

410,3753,810,952

## TOTAL CURRENT ASSETS

\$4,227,887

## SECURITY DEPOSITS

20,725\$4,248,612

## LIABILITIES AND PARTNERS' EQUITY

## CURRENT LIABILITIES:

ACCOUNTS PAYABLE AND ACCRUED EXPENSES

\$ 12,039

NOTES PAYABLE, BANK (NOTE 2)

420,000

DUE TO BROKERS

530,353

PAYROLL TAXES PAYABLE

1,293

DUE TO AFFILIATE

14,913

## TOTAL CURRENT LIABILITIES

978,628

## COMMITMENT (NOTE 3)

## PARTNERS' EQUITY (NOTE 4)

3,269,984\$4,248,612

SEE NOTES TO FINANCIAL STATEMENTS.



## TAKARA PARTNERS

70a

## STATEMENT OF INCOME

JULY 16, 1969 (INCEPTION) TO DECEMBER 31, 1969

## INCOME:

## SECURITY PROFITS (LOSSES):

REALIZED

(\$ 57,626)

UNREALIZED

555,915

\$498,319

INTEREST

20,113

DIVIDENDS

2,674

\$521,105

## EXPENSES:

OPERATING

54,834

INTEREST

13,92968,763

NET INCOME (NOTE 4)

\$452,343

SEE NOTES TO FINANCIAL STATEMENTS.

LAVENTHOL KRIEGER HORNWATH &amp; HORNWATH

## STATEMENT OF PARTNERS' EQUITY

JULY 16, 1969 (INCEPTION) TO DECEMBER 31, 1969

EQUITY CONTRIBUTED		\$2,817,641
ADD NET INCOME FOR THE INITIAL PERIOD (NOTE 4):		
LOSS FROM OPERATIONS	(\$ 45,976)	
REALIZED LOSS ON SECURITIES	( 57,626)	
UNREALIZED GAIN ON SECURITIES	<u>555,945</u>	<u>452,343</u>
PARTNERS' EQUITY, ENDING		<u>\$3,269,084</u>

SEE NOTES TO FINANCIAL STATEMENTS.



## NOTES TO FINANCIAL STATEMENTS

JULY 16, 1969 (INCEPTION) TO DECEMBER 31, 1969

## 1. VALUATION OF INVESTMENTS:

SECURITIES LISTED ON NATIONAL EXCHANGES ARE VALUED AT THE CLOSING SALES PRICE.

UNLISTED SECURITIES ARE VALUED AT THE LAST QUOTED BID PRICE.

RESTRICTED SECURITIES HAVE BEEN APPRAISED BY INVESTMENT BANKERS, SUCH VALUES HAVE BEEN APPROVED BY THE GENERAL PARTNERS.

2. RESTRICTED SECURITIES HAVING A COST AND APPRAISAL VALUE OF \$700,000 ARE PLEDGED AS COLLATERAL FOR THE NOTES PAYABLE, BANK. CERTAIN RECEIVABLES FROM BROKERS AND MARKETABLE SECURITIES MAY BE SUBJECT TO MARGIN RESTRICTIONS.

## 3. COMMITMENT:

THE COMPANY IS OBLIGATED UNDER A LEASE FOR THE RENTAL OF OFFICE SPACE EXPIRING DECEMBER 31, 1982 AT AN ANNUAL COST OF \$23,784.

## 4. INCOME TAXES:

THE LIABILITY, IF ANY, FOR INCOME TAXES OF THE PARTNERS HAS NOT BEEN CONSIDERED HEREIN.

## LAVENTHOL KRIEKESTEIN HORWATH &amp; HORWATH

CERTIFIED PUBLIC ACCOUNTANTS

223 HIGHWAY 10  
POST OFFICE BOX 11  
EAST BRUNSWICK, N.J. 08816  
IN N.J.: 201-257-6500  
IN N.Y.: 212-227-2730

OFFICES THROUGHOUT THE WORLD

## ACCOUNTANTS' REPORT ON SUPPLEMENTARY INFORMATION

TO THE GENERAL PARTNERS OF  
TAKARA PARTNERS  
NEW YORK, NEW YORK

THE FOLLOWING SUPPLEMENTARY INFORMATION OF TAKARA PARTNERS (A LIMITED PARTNERSHIP) FOR THE PERIOD FROM JULY 16, 1969 (INCEPTION) TO DECEMBER 31, 1969, PAGES 7 TO 14, ALTHOUGH NOT CONSIDERED NECESSARY FOR A FAIR PRESENTATION OF FINANCIAL POSITION AND THE RESULTS OF OPERATIONS, IS PRESENTED FOR ANALYSIS PURPOSES. SUCH INFORMATION HAS BEEN SUBJECTED TO THE AUDITING PROCEDURES APPLIED IN OUR EXAMINATION OF THE BASIC FINANCIAL STATEMENTS WHICH ARE COVERED BY OUR OPINION PRESENTED IN THE FIRST SECTION OF THIS REPORT.

IN OUR OPINION, SUCH SUPPLEMENTARY FINANCIAL DATA IS PRESENTED FAIRLY IN ALL MATERIAL RESPECTS IN RELATION TO THE BASIC FINANCIAL STATEMENTS TAKEN AS A WHOLE.

*Laventhol Kriekstein Horwath & Horwath*

MARCH 23, 1970



## INVESTMENTS IN MARKETABLE SECURITIES

DECEMBER 31, 1969

NUMBER OF SHARES	COMMON STOCKS	COST	MARKET VALUE
4,000	ANKA RESEARCH LTD.	\$ 20,000	\$ 20,000
4,800	AQUA AIR SYSTEMS CORP.	28,508	18,000
5,500	BIO-DERIVATIVES CORP.	55,537	44,686
500	BIO MEDICAL RESOURCES	9,500	9,625
5,000	BRILUND MINES, LTD.	273,437	146,875
5,000	COMPUTER PRODUCTS, INC.	16,250	11,250
10,000	COMPUTER STUDIES, INC.	105,234	93,187
5,000	DISPOSABLE SERVICE CORP.	27,895	8,750
1,000	EASTERN AND PACIFIC INDUSTRIES	2,500	1,250
1,200	ELECTRONIC HARDWARE	6,572	4,800
4,250	EXTRUDYNE	12,750	3,187
9,900	FIRST COINVESTORS	59,699	51,975
20,000	FIRST MET REALTY	60,000	27,500
5,000	FOTOMAT CORP.	91,250	80,000
1,500	HARVEY'S STORES, INC.	22,679	21,000
5,000	HEALTH EVALUATION SYSTEMS	50,620	15,000
13,000	IKOR, INC.	78,000	91,000
75	INTERNATIONAL FUNERAL SERVICES, INC.	1,350	1,538
2,000	M.H. STUDIOS	24,290	7,250
5,000	MICROLAB FXR	37,500	28,750
1,500	MICROTHERMAL APPLICATIONS	4,418	2,250
15,775	NATIONWIDE MARKETING	40,438	15,775
1,000	PLANET OIL AND MINERAL	71,561	24,000
200	PREL CORP.	1,400	1,125
2,000	REGAL CREST, INC.	3,821	2,250
12,500	RETENTION COMMUNICATION	62,500	90,625
3,000	ROCKOVER BROS.	72,577	70,875
800	SURVIVAL	12,000	10,600
	TOTAL COMMON STOCKS	1,252,286	903,125
FACE AMOUNT	CONVERTIBLE DEBENTURES		
\$200,000	N.M.C. CORP. 6 1/2%, 1984	138,250	118,000
170,000	VIATRON COMPUTER SYSTEMS 6 1/4%, 1989	170,000	173,400
	TOTAL CONVERTIBLE DEBENTURES	308,250	291,400
	TOTAL INVESTMENTS IN MARKETABLE SECURITIES	\$1,560,536	\$1,194,525

## INVESTMENTS IN RESTRICTED SECURITIES

DECEMBER 31, 1969

NUMBER OF SHARES	COMPANY	COST	APPRAISAL VALUE
100,000	ACADEMIC DEVELOPMENT CORPORATION	\$ 400,000	\$ 400,000
16,667	COMPUTER TOOLS	75,000	83,335
100,000	DELANAIR, INC.	300,000	276,000
100,000	DELANAIR, INC. WARRANTS	100,000	225,000
135,000	DEVON, INC.	13,500	371,250
70,175	INTERNATIONAL COMPUTER PRODUCTS	200,000	326,312
11,112	MEDEQUIP CORPORATION	80,000	111,120
100,000	SCIENCE SYSTEMS AND TECHNOLOGY	300,000	300,000
		<u>\$1,468,500</u>	<u>\$2,093,019</u>





TAKA  
INVESTMENT  
DECEMBER

<u>NUMBER OF SHARES</u>	<u>COMMON STOCK</u>	<u>EX</u>
5,000	BENQUET CONSOLIDATED, INC.	JANUAR
5,000	BENQUET CONSOLIDATED, INC.	JANUAR
300	CENTRONICS DATA COMPUTER CORP.	JANUAR
2,000	PLANET OIL AND MINERAL	JANUAR
9,500	SYNCHRONEX CORP.	JANUAR



RA PARTNERS

TS IN CALL OPTIONS

BER. 31, 1969

<u>PIRE</u>	<u>COST</u>	<u>MARKET VALUE OF SECURITY</u>	<u>OPTION PRICE</u>	<u>MARKET VALUE OF CALL OPTIONS</u>
Y 12, 1970	\$ 45,313			
Y 12, 1970	12,813	\$ 61,875	\$ 50,000	\$ 11,875
Y 17, 1970	2,531	61,875	50,000	11,875
Y 20, 1970	114,875	6,638	4,200	2,438
Y 15, 1970	50,468	48,000	30,000	18,000
	<u>226,000</u>	<u>149,625</u>	<u>80,750</u>	<u>68,875</u>
		<u>\$328,013</u>	<u>\$214,750</u>	<u>\$113,063</u>

## TAKARA PARTNERS

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## PUT OPTIONS AVAILABLE

DECEMBER 31, 1969

<u>NUMBER OF SHARES</u>	<u>SECURITY</u>	<u>EXPIRE</u>	<u>OPTION PRICE</u>	<u>MARKET VALUE OF SECURITY</u>	<u>MARKET VALUE OF PUT OPTIONS AVAILABLE</u>
5,000	BRILUND MINES	MARCH 31, 1970	\$110,000	\$146,875	\$263,125
10,000	COMPUTER STUDIES	JUNE 30, 1970	120,000	88,750	31,250
2,000	PLANET OIL AND MINERAL	MARCH 31, 1970	104,000	48,000	116,000
			<u>\$694,000</u>	<u>\$283,625</u>	<u>\$410,375</u>



## TAKARA PARTNERS

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## ANALYSIS OF INCOME

JULY 16, 1969 (INCEPTION) TO DECEMBER 31, 1969

## REALIZED LOSSES ON SECURITIES, NET:

LONG-TERM

(\$12,962)

SHORT-TERM

(44,664)(\$57,626)

## INTEREST:

SHORT TERM PAPER

\$ 3,920

CONVERTIBLE DEBENTURES

14,468

DEVON INTERNATIONAL

1,725\$20,113

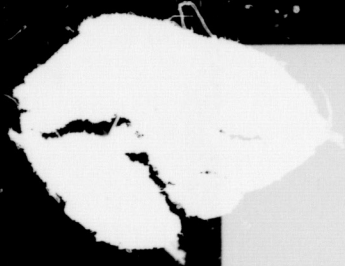
## DIVIDENDS:

CITIES SERVICE

\$ 2,000

OTHER

674\$ 2,674





## TAKARA PARTNERS

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## ANALYSIS OF EXPENSES

JULY 16, 1959 (INCEPTION) TO DECEMBER 31, 1969

## OPERATING

DUES AND SUBSCRIPTIONS	\$ 265
EQUIPMENT RENTAL	999
INSURANCE	459
MISCELLANEOUS	1,077
OFFICE	2,447
PAYROLL	5,890
PAYROLL TAXES	637
PROFESSIONAL FEES	27,523
RENT	6,949
SUNDRY TAXES	287
TELEPHONE	3,188
TRAVEL	5,113
	<u>\$54,834</u>

## INTEREST

BANK	\$ 8,450
LYNCH JONES AND RYAN	4,830
WERTHEIM AND CO.	618
OTHER	31
	<u>\$13,929</u>

## STATEMENT OF PARTNE

JULY 16, 1969 (INCEPTION)

	CAPITAL CONTRIBUTED	LOSS FROM OPERATIONS
PARTNERS:		
MARTIN G. BERGMAN	\$ 100,000	( \$ 1,692)
DAVID F. BOLGER	100,000	( 1,692)
JOHN L. BURNS	207,000	( 3,493)
ALICE J. CHISHOLM	100,000	( 1,692)
WILLIAM H. DAVIS	100,000	( 1,692)
J. RICHARDSON DILWORTH	100,000	( 1,692)
THE E.F. MACDONALD EMPLOYEES SAVINGS AND PROFIT SHARING TRUST	200,000	( 3,384)
LAWRENCE ELLMAN	100,000	( 1,692)
G. KEITH FUNSTON	110,000	( 1,857)
ANNA L. GRISVOLD	100,000	( 1,692)
LAWRENCE G. Haggerty	94,977	( 1,605)
HELLER BROS. CO.	100,000	( 1,692)
JOHN D. LEVY	100,000	( 1,692)
MARVIN LOEB	100,000	( 1,692)
M.H. COMPANY	100,000	( 1,692)
OVERLOOK ASSOCIATES	95,664	( 1,618)
JOSEPH PICONE	100,000	( 1,692)
JACK M. SHAW	100,000	( 1,692)
ROSE H. SHAW	100,000	( 1,692)
ALFRED SCOTT	100,000	( 1,692)
DAVID S. SMITH	100,000	( 1,692)
THREE FIFTY INVESTMENTS	210,000	( 3,558)
PETER VON WIEDENTHAL	100,000	( 1,692)
AKIYOSHI YAMADA	100,000	( 1,692)
GENERAL PARTNERS		
	2,717,641	( 45,976)
ALFRED SCOTT (A)	100,000	
	<u>\$2,817,641</u>	<u>( 45,976)</u>



ERS' EQUITY

TO DECEMBER 31, 1969

80a

REALIZED  
LOSS ON  
SECURITIES

( \$ 2,121)  
( 2,121)  
( 4,383)  
( 2,121)  
( 2,121)  
( 2,121)

( 4,239)  
( 2,121)  
( 2,328)  
( 2,121)  
( 2,011)  
( 2,121)  
( 2,121)  
( 2,121)  
( 2,121)  
( 2,121)  
( 2,029)  
( 2,121)  
( 2,121)  
( 2,121)  
( 2,121)  
( 2,121)  
( 2,121)  
( 2,121)  
( 4,458)  
( 2,121)  
( 2,121)

( 57,626)

( \$ 57,626)

UNREALIZED  
GAIN ON  
SECURITIES

\$ 20,459  
20,459  
42,306  
20,459  
20,459  
20,459

40,917

20,459

22,450

20,459

19,402

20,459

20,459

20,459

20,459

19,569

20,459

20,459

20,459

20,459

20,459

43,029

20,459

20,459

555,945

\$ 555,945

PARTNERS'  
EQUITY PER  
PARTNERSHIP  
AGREEMENT

\$ 116,646  
116,646  
241,425  
116,646  
116,646  
116,646

233,294

116,646

128,275

116,646

110,763

116,646

116,646

116,646

116,646

111,586

116,646

116,646

116,646

116,646

116,646

245,013

116,646

116,646

3,169,984  
100,000

\$ 3,269,984

## TAKARA PARTNERS

1a

## LIQUIDATING VALUE OF PARTNERS' EQUITY

DECEMBER 31, 1969

PARTNER:	PARTNERS' EQUITY PER PARTNERSHIP AGREEMENT	PROVISION FOR DISTRIBUTION TO GENERAL PARTNERS	LIQUIDATING VALUE OF PARTNERS' EQUITY
MARTIN G. BUCHANAN	\$ 116,646	(\$ 3,668)	\$ 112,978
DAVID F. DUNN	116,646	( 3,668)	112,978
JOHN L. RUDOLPH	241,125	( 7,583)	233,542
ALICE J. CANNON	116,646	( 3,668)	112,978
WILLIAM H. EVIS	116,646	( 3,668)	112,978
J. RICHARDSON DUNN	116,646	( 3,668)	112,978
THE E.F. MACDONALD EMPLOYEES SAVINGS AND PROFIT SHARING TRUST	233,294	( 7,334)	225,960
LAWRENCE E. ...	116,646	( 3,668)	112,978
G. KEITH FLEISCHER	128,275	( 4,025)	124,250
ANNA L. GRIMOLD	116,646	( 3,668)	112,978
LAWRENCE G. MAGGON	110,763	( 3,478)	107,285
HELLER BROS. CO.	116,646	( 3,668)	112,978
JOHN D. LEVY	116,646	( 3,668)	112,978
MARVIN LOER	116,646	( 3,668)	112,978
M.H. COMPANY	116,646	( 3,668)	112,978
OVERLOOK ASSOCIATES	111,586	( 3,508)	108,078
JOSEPH PICONE	116,646	( 3,668)	112,978
JACK H. SHAPIRO	116,646	( 3,668)	112,978
ROSE H. SHAPIRO	116,646	( 3,668)	112,978
ALFRED SCOTT	116,646	( 3,668)	112,978
DAVID S. SMITH	116,646	( 3,668)	112,978
THREE FIFTY INVESTMENTS	245,013	( 7,713)	237,300
PETER VON WIESENTHAL	116,646	( 3,668)	112,978
AKIYOSHI YAMADA	116,646	( 3,667)	112,979
GENERAL PARTNERS		99,661	99,661
ALFRED SCOTT (A)	3,169,984	-0-	3,169,984
	100,000		100,000
	<u>\$3,269,984</u>	<u>\$ -0-</u>	<u>\$3,269,984</u>

(A) AS OF JANUARY 1, 1970.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

82a

COMPETITIVE CAPITAL CORPORATION  
and COMPETITIVE ASSOCIATES, INC.,

72 Civ. 1986 (T.P.G.)

Plaintiffs,

against

AKIYOSHI YAMADA, LAVENTHOL, KREKSTEIN,  
HORWATH & HORWATH, MORTON DEAR,  
ROBERT E. BIER, THOMAS MARTINO, JR.,  
TAKARA ASSET MANAGEMENT CORPORATION  
and IRA N. SMITH,

STATEMENT PURSUANT  
TO RULE 9(g)

Defendants.

Defendant Laventhol, Krekstein, Horwath & Horwath ("LKH&H"), pursuant to Rule 9(g) of the General Rules of this Court, states that there is no genuine issue to be tried as to the following material facts:

1. Competitive Capital Corporation ("Competitive Capital") is, and at all times relevant has been, a California corporation with its principal place of business in the State of California, registered as an investment adviser under the Investment Advisers Act of 1940, as amended, and fund manager of Competitive Associates, Inc. ("Competitive Associates").

2. Competitive Associates is, and at all times relevant has been, a Delaware corporation with its principal place of business in the State of California and a management open end investment company, registered with the Securities and Exchange Commission pursuant to section 8 of the Investment

Company Act of 1940, as amended.

3. Defendant Akiyoshi Yamada ("Yamada") is an individual who was at all times pertinent hereto, a resident of the City and State of New York.

4. Defendant LKH&H is, and was at all times pertinent hereto, a partnership of public accountants with offices in East Brunswick, New Jersey.

5. Defendant Morton Dear is an individual who was, at all times pertinent hereto, a partner of defendant LKH&H.

6. Defendants Robert E. Bier and Thomas Martino, Jr. are individuals who, at all times pertinent hereto, were employed by the defendant LKH&H.

7. Defendant Takara Asset Management Corporation ("Takara Management") was, at all times pertinent hereto, a portfolio management company with offices in New York City, whose sole shareholder was defendant Yamada.

8. In April 1970, Competitive Capital decided to retain new portfolio managers for the securities held by Competitive Associates.

9. Mr. J. Robert Randolph was assigned the responsibility for the selection of the new portfolio managers by Competitive Capital.



10. In the spring of 1970, Mr. Randolph interviewed Mr. Yamada and obtained a letter from him describing two firms whose investments had been managed by Yamada. The two firms were Takara Partners, an investment partnership, and Armstrong Investors, an off-shore fund.

11. On June 25, 1970, Mr. Randolph submitted to the Board of Directors of Competitive Capital a write-up containing the substance of his interview with Yamada and Yamada's letter and recommended that Mr. Yamada's firm, Takara Management, be employed as a portfolio manager for Competitive Associates.

12. On October 9, 1970, Mr. Randolph was authorized by the Board of Directors of Competitive Capital to execute a portfolio manager's contract with Takara Management and on October 12, 1970, Takara Management commenced acting as portfolio manager for a portion of the portfolio of Competitive Associates.

13. No person other than Randolph did any work whatsoever on behalf of plaintiffs in connection with the investigation of potential portfolio managers and, in particular, in connection with the investigation of Takara Management.

14. During the period from approximately October 12, 1970 through May 14, 1971, Takara Management managed a portion of the portfolio of Competitive Associates. Plain-

tiffs claim that the portion of the portfolio of Competitive Associates managed by Takara Management decreased in value by \$5 million and that they suffered an additional \$1 million damages in lost prestige, all of which resulted from fraudulent mismanagement of the portfolio by Takara Management and Yamada.

15. The financial statements for Takara Partners for the period July 16, 1969 (inception) through December 31, 1969, certified by LKH&H, were not seen by Mr. Randolph until May 10, 1971 on the occasion of his interrogation by the staff of the Securities and Exchange Commission.

16. The financial statements of Takara Partners, certified by defendant LKH&H, were not referred to at any Board of Directors meeting of either plaintiff at any time prior to May 10, 1971.

Dated: New York, New York  
February 27, 1974

SHEA GOULD CLIMENKO & KRAMER

By Michael Gould

A Member of the Firm  
Attorneys for Defendant LKH&H  
330 Madison Avenue  
New York, New York 10017



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
:  
COMPETITIVE CAPITAL CORPORATION and  
COMPETITIVE ASSOCIATES, INC., :  
:  
Plaintiffs, : Index No. 72 Civ. 1986  
:(T.P.G.)  
:  
-against- :  
:  
AKIYOSHI YAMADA, LAVENTHOL, KREKSTEIN, :  
HORWATH & HORWATH, MORTON DEAR, ROBERT :  
E. BIER, THOMAS MARTINO, JR., TAKARA : DEFENDANTS DEAR AND  
ASSET MANAGEMENT CORPORATION and : MARTINO'S MOTION FOR  
IRA N. SMITH, : SUMMARY JUDGMENT  
:  
Defendants. :  
----- X

S I R S :


PLEASE TAKE NOTICE that upon the affidavit of  
David P. Steinmann, sworn to on March 4, 1974, and upon the  
pleadings and all prior proceedings had herein, the under-  
signed will move this Court before the Hon. Thomas P. Griesa,  
United States District Judge, in Room 501, on the 13th day  
of March, 1974, at M. of that day, or as soon  
thereafter as counsel can be heard, for an order pursuant  
to Rule 56, Fed. R. Civ. P., granting summary judgment in  
favor of defendants Morton Dear and Thomas Martino, Jr.  
and dismissing the complaint herein on the ground that the  
pleadings, depositions and other undisputed facts herein  
show that there is no genuine issue as to any material fact  
and that defendants Dear and Martino are entitled to  
judgment as a matter of law; and for such other and further

relief as to this Court may seem just and proper.

Dated: New York, New York  
March 4, 1974

Yours, etc.

CHRISTY, FREY & CHRISTY

By   
A Member of the Firm

Attorneys for Defendants Morton Dear  
and Thomas Martino, Jr.  
45 Rockefeller Plaza  
New York, New York 10020

TO:

LAWLER, STERLING & KENT, ESQS.  
Attorneys for Plaintiffs  
500 Fifth Avenue  
New York, New York 10036

AMEN, WEISMAN & BUTLER, ESQS.  
Attorneys for Akiyoshi Yamada  
17 East 63rd Street  
New York, New York

HART & HUME, ESQS.  
Attorneys for Ira N. Smith  
10 East 40th Street  
New York, New York

SHEA GOULD CLIMENKO & KRAMER  
330 Madison Avenue  
New York, New York 10017



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
:  
COMPETITIVE CAPITAL CORPORATION and  
COMPETITIVE ASSOCIATES, INC., :  
:  
Plaintiffs, : Index No. 72 Civ. 1986  
:(T.P.G.)  
:  
-against- :  
:  
AKIYOSHI YAMADA, LAVENTHOL, KREKSTEIN, :  
HORWATH & HORWATH, MORTON DEAR, ROBERT : AFFIDAVIT IN SUPPORT  
E. BIER, THOMAS MARTINO, JR., TAKARA : OF MOTION FOR  
ASSET MANAGEMENT CORPORATION and : SUMMARY JUDGMENT  
IRA N. SMITH, :  
:  
Defendants. :  
----- X

STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF NEW YORK )

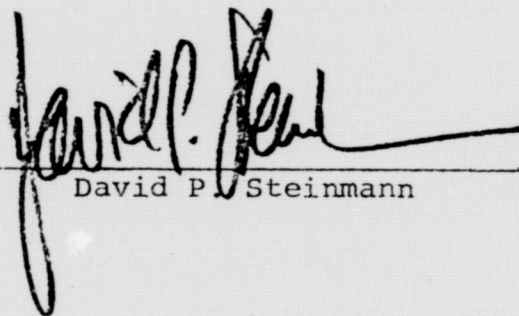
DAVID P. STEINMANN, being duly sworn, deposes  
and says:

1. I am an attorney associated with the firm of  
Christy, Frey & Christy, attorneys for defendants Morton Dear  
and Thomas Martino, Jr. in the above-captioned action. As  
such, I am fully familiar with this case. I make this  
affidavit in support of defendants Dear and Martino's motion  
for summary judgment herein.

2. This motion is being made by defendants Dear  
and Martino in conjunction with defendant Laventhol, Krekstein,  
Horwath & Horwath ("LKH&H"). The interests of these defendants

are identical herein, as are their positions. It is for that reason that defendants Dear and Martino join defendant LKH&H in this motion.

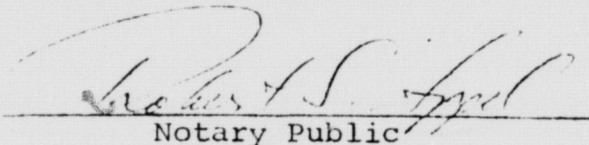
3. Because of the identity of the positions of these defendants, the Court is respectfully referred to the Memorandum of Law submitted by LKH&H herein in support of this motion. It fully states the applicable law and defendants Dear and Martino see no reason to burden the Court with a repetition of the substance of that Memorandum.



David P. Steinmann

Sworn to before me this

4<sup>th</sup> day of <sup>MARCH</sup>~~February~~, 1974.



Notary Public

ROBERT S. APPEL  
Notary Public, State of New York  
No. 31 0084325  
Qualified in ~~New York County~~ <sup>Westchester County</sup>  
Commission Expires March 30, 1975  
CENT. INDEX IN N.Y. COUNTY



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - -	X
COMPETITIVE CAPITAL CORPORATION and	:
COMPETITIVE ASSOCIATES, INC.,	:
Plaintiffs,	: Index No. 72 Civ. 1986
-against-	: (T.P.G.)
AKIYOSHI YAMADA, LAVENTHOL, KREKSTEIN,	:
HORWATH & HORWATH, MORTON DEAR, ROBERT	: MOVING DEFENDANTS'
E. BIER, THOMAS MARTINO, JR., TAKARA	: <u>RULE 9(g) STATEMENT</u>
ASSET MANAGEMENT CORPORATION and	:
IRA N. SMITH,	:
Defendants.	:
- - - - -	X

S I R S :

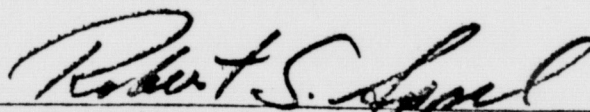
PLEASE TAKE NOTICE that on behalf of defendants Morton Dear and Thomas Martino, Jr., pursuant to General Rule 9(g) of this Court, we have reviewed the Rule 9(g) Statement submitted by defendant Laventhol, Krekstein, Horwath & Horwath in connection with their pending motion for identical relief herein, and we concur in that statement's rendition of the facts as to which there exists no genuine issue of fact warranting trial.

Dated: New York, New York  
March 4, 1974

Yours, etc.,

CHRISTY, FREY & CHRISTY

By



A Member of the Firm

Attorneys for defendants Morton Dear  
and Thomas Martino, Jr.

45 Rockefeller Plaza

New York, New York 10020

Tel: (212) 246-8380

TO:

LAWLER, STERLING & KENT, ESQS.

Attorneys for Plaintiffs

500 Fifth Avenue

New York, New York 10036

AMEN, WEISMAN & BUTLER, ESQS.

Attorneys for Akiyoshi Yamada

17 East 63rd Street

New York, New York

HART & HUME, ESQS.

Attorneys for Ira N. Smith

10 East 40th Street

New York, New York

SHEA GOULD CLIMENKO & KRAMER

330 Madison Avenue

New York, New York 10017



Plaintiffs,

-against-

AKIYOSHI YAMADA, et al.,

Defendants.

# AFFIDAVIT

STATE OF NEW YORK)

SS. :

COUNTY OF NEW YORK)

S. PITKIN MARSHALL, being duly sworn, deposes and says:

1. I am associated with Lawler, Sterling & Kent, co-counsel for plaintiffs (with Butowsky, Schwenke & Devine). This affidavit is made in opposition to the motions of defendants Laventhol, Krekstein, Horwath and Horwath and Dear and Martino for summary judgment.

2. The following exhibits are annexed hereto:

(i) Exhibit A is a complete copy of a letter, dated June 12, 1970, from Mr. Yamada to Mr. Randolph.

(ii) Exhibit B is that portion of the complaint in SEC v. Everest Management Corp., et al., 71 Civ. 4932 D.N.E., which relates to the defendants in this action.

(iii) Exhibit C contains copies of pp. 70 through 75 and 79 through 91 of the Deposition of Alan R. Markizon taken by defendant, Ira Smith on October 17, 1973. In general, these pages show in more detail than is contained

in moving defendants' affidavit the process through which Yamada was selected and retained by Competitive Associates as a portfolio manager.

(iv) Exhibit D contains copies of pp. 107 through 110 of the Deposition of Alan R. Markizon taken by defendant, Laventhol, Krekstein, Horwath and Horwath on October 24, 1973.

3. Moving Defendants rely heavily on the testimony of J. Robert Randolph given before the Securities and Exchange Commission. It should go without saying that such testimony is not competent in this case. Neither the plaintiffs nor any of the other defendants were present to cross-examine Randolph and to look more deeply into the matters which he apparently discussed with the SEC. Certainly such testimony, inadmissible in this case, is an improper basis upon which to grant summary judgment.

4. In addition, it should be pointed out that the Randolph testimony was selectively edited to appear most favorable to Moving Defendants. On p. 33 of the transcript of the same deposition that is cited by Moving Defendants, the following exchange took place:

"Q. During this initial interview, did Mr. Yamada bring with him documents reflecting the performance of Takara Partners?

A. Yes, Takara Partners.

Q. Do you recall anything that he had with him?

A. No, nothing seemed to be unusual and nothing seemed to bother me.

Q. Did you see any audited figures on Takara Partners?

A. No, I did not. I don't remember them as being audited.



Q. Did Mr. Yamada give you anything for retention at that time?

A. No, he did not. That is one of the reasons I asked for the letter and a list of his partners.

Q. Did you do any kind of a credit check or any sort of investigation on Mr. Yamada?

A. We did no sort of D&B financial checking, no, other than just people in the business who had done business with him and who had known him, such as Mr. Sprinkel and Mr. Boesel."

Randolph seems sure then that he does not remember figures which Yamada showed him as being audited. He is equally sure, however, that he did see documents "reflecting the performance of Takara Partners". Those documents may well have been the same financial statement (albeit unaudited) as is in question on this motion; or they may have been other figures or other statements which were based on the (audited or unaudited) financial statement. It would seem to make little difference. The point is that Randolph's testimony to the SEC is neither (1) admissible in this motion, nor (2) determinative of the issues raised on this motion.

5. It is respectfully submitted that when the documents and the sworn testimony attached hereto are considered as a whole, it is amply clear that there exist issues of fact with respect to plaintiffs' reliance on Moving Defendants' alleged misrepresentations or with respect to the causal connection between those representations and plaintiffs' purchase of securities at Yamada's direction. These factual issues can only be determined at a full trial on the merits.

WHEREFORE, plaintiffs respectfully request that the respective motions of Laventhol, Krekstein, Horwath and Horwath

and Dear and Martino be denied in all respects.

*S. Pitkin Marshall*  
S. Pitkin Marshall

Sworn to before me this

2nd day of April, 1974

*Marie Stanis*  
MARIE STANIS  
NOTARY PUBLIC, State of New York  
No. 24 9321462  
Qualified in Kings County  
Certificate filed in New York County  
Commission Expires March 30, 1974



LETTER OF JUNE 12, 1970, FROM YAMADA TO RANDOLPH WITH ATTACHMENT  
TAKARA PARTNERS EXHIBIT "A"

12 MADISON AVENUE, NEW YORK, N. Y. 10017  
(212) 682-2682

96a

June 12, 1970

Mr. Jerry Randolph  
Chancellor Management Corp.  
1900 Avenue of the Stars  
Los Angeles, California 90067

Dear Jerry:

We very much appreciate your considering my partner John Galanis and myself as managers for a segment of Competitive Capital Fund. As you know, we are private money managers and do not at present manage public funds. We therefore have no printed brochure to make available to you in explaining our organization. However, I would like to outline it briefly for you.

We presently manage a domestic partnership with \$6 million in assets called Takara Partners. Takara was up 14.3% in 1969, and it is presently up 5.3% for 1970. We also manage Armstrong Investors, S.A., an offshore fund with assets in excess of \$8 million. The fund commenced operations on February 15 of this year with a net asset value of \$20.00 per share. Its net asset value is now \$21.64 or up 8.5%. We also manage several private accounts totaling slightly over \$8 million. Takara Partners is a partnership of which both John Galanis and I are General Partners, and Mr. John L. Burns, former Chairman of the Board of Cities Service, is a special Limited Partner. A list of other limited partners of Takara Partners is attached as is a prospectus of Armstrong Investors, S.A. Armstrong Investors and our private accounts are managed by Everest Management Corp., an unregistered investment advisor of which John and myself are the principal stockholders. A biographical sketch of the principal people of our organization including John and myself is available on pages 4 and 5 of the Armstrong prospectus.

Again let me reiterate my thanks for your considering using us as possible managers for Competitive Capital Fund.

Sincerely,

*Akiyoshi Yamada*  
AKIYOSHI YAMADA

AY/mm

*To: SLC  
From: AY*

*Have picture  
sent right away  
covered too early*

*Eastman Kodak  
7/11/70  
Lamm*

*cc: Mr. Viny  
Halt*

## TAKARA PARTNERS

342 MADISON AVENUE, NEW YORK, N.Y. 10017

(212) 682-2662

January 1, 1970

GENERAL PARTNER:

## Address of Record:

Yamada, Mr. Akiyoshi  
233 East 69th. St., Apt. 9I  
New York, New York 10021

## Correspondence:

Suite 2205  
342 Madison Avenue  
New York, New York 10017

LIMITED PARTNERS:

Bergman, Mr. Martin G.  
E.C. 506  
Green Hill Apartments  
Philadelphia, Pa.

c/o Mr. Peter Engelbach  
Janney, Battles & E.W. Clark  
1401 Walnut St.  
Philadelphia, Pa.

Bolger, Mr. David F.  
240 North Murray Avenue  
Ridgewood, New Jersey

Burns, Mr. John L.  
Fox Run Lane  
Greenwich, Conn. 06830

Chisholm, Mrs. Alice J.  
105 Field Point Circle  
Greenwich, Conn. 06830

c/o Mr. Wm. H. Chisholm  
Oxford Paper Company  
277 Park Avenue  
New York, New York

Davis, Mr. William H.  
65 West Brother Drive  
Greenwich, Conn.

Dilworth, Mr. J. Richardson  
141 Hodge Road  
Princeton, New Jersey

Rockefeller Bros. Room 5600  
30 Rockefeller Plaza  
New York, New York

Ellman, Mr. Lawrence  
1 West 72nd. St.  
New York, New York

President, Longchamps Corp.  
230 Park Avenue  
New York, New York

Funston, Mr. G. Keith  
74 Vineyard Lane  
Greenwich, Conn. 06830

Chairman of the Board  
Olin Mathieson  
460 Park Avenue  
New York, New York 10022



Address of record:

Griswold, Mrs. Anna L.  
Meads Point  
Greenwich, Conn. 06830

Haggerty, Mr. Lawrence G.  
850 Alles Road  
Winnetka, Illinois 60093

Heller Bros. Co.  
c/o Mr. Jas. Heller  
President  
600 Madison Avenue  
New York, New York

Levy, Mr. John D.  
509 West Polo Drive  
St. Louis, Missouri 63112

Loeb, Mr. Marvin  
7350 North Washtinaw  
Chicago, Illinois

The E.F. MacDonald Employees' Savings  
and Profit Sharing Trust  
c/o Mr. John F. Higgins, Exec. Vice Pres.  
for Corporate Planning  
129 South Ludlow  
Dayton, Ohio 45402

Overlook Associates  
c/o Mr. Eugene Peterson  
International Tel. & Tel.  
320 Park Avenue  
New York, New York

Picone, Mr. Joseph  
Waldorf Towers  
Park Avenue and 50th. St.  
New York, New York

M.H. Company  
c/o Mr. Max Shalom  
President  
2055 East 5th. St.  
Brooklyn, New York

Correspondence:

540 Frontage Road, Room 268  
Northfield, Illinois 60093

Exec. Vice Pres.  
Angelica Corp.  
700 Rosedale Avenue  
St. Louis, Missouri

Chairman of the Board  
Medequip Corp.  
205 Touhy  
Park Ridge, Illinois

41 West Putnam Avenue  
Greenwich, Conn. 06830

Attention: Mr. Richard Hanley

President  
Evan-Picone, Inc.  
7020 Kennedy Blvd.  
North Bergen, New Jersey

Address of record:

Scott, Mr. Alfred  
1160 Park Avenue  
New York, New York 10028

Shaw, Mr. Jack M.  
Dairy Lane  
East Liverpool, Ohio

Shaw, Mrs. Rose H.  
Dairy Lane  
East Liverpool, Ohio

Smith, Mr. David S.  
350 Park Avenue  
New York, New York

Tobias, Dr. Jas. B.  
10105 Tarpon Drive  
St. Petersburg, Florida

Three Fifty Investments  
c/o Mr. J.T. White  
350 Park Avenue - 23rd. Floor  
New York, New York

Von Wiesenenthal, Mr. Peter  
17 East 89th. St.  
New York, New York 10028

Yamada, Mr. Akiyoshi  
233 East 69th. St., Apt. 9I  
New York, New York 10021

D'Onofrio, Mr. Raymond  
D'Onofrio & Feeney  
140 East 56th. St.  
New York, New York

Galanis, Mr. John Peter  
985 Fifth Avenue  
New York, New York

Correspondence:

President  
Bell Equipment Co.  
850 Third Avenue  
New York, New York

President  
Palms of Pasadena Hospital Corp.  
1609 Pasadena Avenue South  
St. Petersburg, Florida

President  
Alcorn Combustion Co.  
850 Third Avenue  
New York, New York

Suite 2205  
342 Madison Avenue  
New York, New York 10017



COUNT THIRTY

Section 17(a) of the Securities Act,  
Section 10(b) of the Exchange Act and  
Rule 10b-5 thereunder and Sections  
206(1) and (2) of the Advisers Act.  
(False Certified Financial Statements  
of Takara Partners).

232. The allegations of paragraphs 1 through 231 and 242 through 245 of this Complaint are realleged and incorporated herein by reference.

233. In or about March 1970, defendants GALANIS, YAMADA, KAPLAN, LAVENTHOL, DEAR, BIER and MARTINO singly and in concert, directly and indirectly in connection with the purchase and sale of securities disseminated to the limited partners of Takara Partners and to others financial statements for Takara Partners certified by defendant LAVENTHOL which included an income statement for the period from July 16, 1969 (inception) to December 31, 1969 and a balance sheet as of December 31, 1969. These statements represented, among other things, that:

A. Takara Partners had:

- (1) Net income of \$452,343;
- (2) Unrealized profit of \$555,945;
- (3) Total current assets of \$4,248,612;
- (4) Total current liabilities of \$978,628;
- (5) Marketable and restricted securities valued at \$3,287,544;

(6) Put options available with a value of \$410,375;

B. Defendant LAVENTHOL was independent and was qualified to certify as such to the financial statements of Takara Partners.

234. The financial statements described in the foregoing paragraph were false and misleading in that, among other things:

- (1) Takara Partners had no net income, but substantial losses;
- (2) Takara Partners had no unrealized profit and a substantial unrealized loss;
- (3) The total current assets figure included non-existent items and items whose values were grossly overstated;
- (4) The total current liabilities figure was understated by approximately \$400,000;
- (5) Values of securities were grossly overstated;
- (6) The purported put options did not exist;
- (7) Defendant LAVENTHOL was not independent and was not qualified to certify the financial statements of Takara Partners because defendants DEAR, BIER and MARTINO, partners and/or employees of LAVENTHOL, during the period of time when they were working on the preparation of the financial statements had received payments from defendants



GALANIS and YAMADA totalling approximately \$17,000 in the guise of profits from participation in the purchase and sale of "hot issues".

235. In addition, the financial statements of Takara Partners failed to disclose, among other things:

- (1) That many of the securities in the portfolio were securities of issuers with minimal assets and no past history of earnings which had been purchased in large blocks and that the market for most of these securities was very limited and highly volatile;
- (2) That restricted securities had been valued at arbitrary and excessive figures by persons who were close business associates of defendants YAMADA and GALANIS and who had in many cases been involved in the transactions in which the securities had been purchased;
- (3) That \$240,000 included in the total current asset figure had been misappropriated from defendant MICROTHERMAL as described in paragraphs 242 through 245 below;
- (4) That during the period from December 31, 1969 to the date of issuance of the financial statements, significant partnership events had occurred including among other things:

- (a) Payments made on previously undisclosed liabilities;
  - (b) Receipt of additional funds misappropriated from defendant MICROT FINANCIAL as described in paragraphs 242 through 245 below;
  - (c) Further losses and deterioration of the financial condition of Takara Partners;
- (5) The manner in which securities had been purchased from Takara Partners which is in part described in paragraphs 220 through 222 above;
- (6) The control and manipulation by defendant YAMADA, GALANIS and their associates of the market for some of the securities purchased for Takara Partners.

236. The false and misleading representations described in paragraphs 233 through 235 above were repeated by defendants GALANIS and YAMADA to other persons in order to induce such persons to entrust assets to defendants GALANIS, YAMADA, EVEREST and TAKARA MANAGEMENT for investment management.

237. By reason of the activities described in paragraphs 232 through 236 above, defendants GALANIS, YAMADA, EVEREST, KAPLAN, LAVENTHOL, DEAR, BIER and MARTINO violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Sections 206(1) and (2) of the Advisers Act.



COUNT THIRTY-ONE

Violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Sections 206(1) and (2) of the Advisers Act (False statements to limited partners of Takara Partners in April 1971).

238. The allegations of paragraphs 1 through 237 of this Complaint are realleged and incorporated herein by reference.

239. On or about April 15, 1971 defendants YAMADA, LAVENTHOL and DEAR, singly and in concert, directly and indirectly, in connection with the purchase and sale of securities, issued and disseminated to each of the limited partners of Takara Partners a letter which purported to inform each partner of his share of income, credits and deductions as reported by Takara Partners on its U.S. Partnership Return of Income, Form 1065 for the calendar year 1970. These letters represented that each partner should report net income (in varying amounts) as his proportionate share of partnership income during 1970. These letters which were signed by defendant DEAR on behalf of defendant LAVENTHOL, were false and misleading in that they represented that Takara Partners had earned a profit in 1970 when in fact the investment activities of Takara Partners had not been profitable and had resulted in substantial and continuing losses so that by

April 1973 almost the entire original investment of the limited partners had been dissipated. These letters also failed to disclose the activities described in paragraphs 220 through 236 above and the misappropriation and conversion alleged in paragraph 78 above.

240. By reason of the activity described in paragraphs 238 and 239 above, defendants YAMADA, LAVENTHOL and DEAR violated Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Sections 206(1) and (2) of the Advisers Act.



Markizon

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2 Q Mr. Markizon, can you tell us, please, when for  
3 the first time plaintiffs herein considered retaining  
4 Takara Asset as the portfolio manager?

5 A Sometime in May or June 1970.

6 Q Was this at a Board meeting?

7 By "Board," I mean a Board of Directors meeting.

8 THE WITNESS: Sir, would you read the question  
9 back before this last one? .

10 (The question and answer thereto appearing on  
11 Lines 2 through 5, above, were read by the reporter.)

12 A Competitive Capital Corporation, in May of 1970,  
13 began thinking of and looking for replacements for the then  
14 portfolio managers of Competitive Associates, Inc., and at  
15 that time or beginning at that time, they interviewed forty  
16 or more candidates for that, or had forty or more  
17 recommendations and interviewed twenty-five. One of those  
18 persons was Akiyoshi Yamada.

19 Q Did any one individual on behalf of Competitive  
20 Capital do the interviewing?

21 A Yes.

22 Q Who was that, sir?

23 A J. Robert Randolph.

24 Q That was in May or June of 1970, sir?

25 A Yes, sir.

Markizon

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Q What was Mr. Randolph's position with Competitive Capital at that time?

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A Mr. Randolph became president of Competitive Capital Corporation, I believe, in mid-June 1970.

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Somewhat before that, he had been hired by the Seaboard Corporation to be president of its other management subsidiaries, and he was doing research, more or less as an employee or agent for Competitive Capital Corporation, and became its president about June 15th; or sometime in June, June 25 or something.

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Q Prior to being hired by Seaboard, do you know Mr. Randolph's background?

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A Yes. He was president of Chancellor Management Corporation immediately before coming to Seaboard. Before that, I think he had been with William O'Neil & Company, and, before that, he had been with Title Insurance in Los Angeles, and, before that, with Stern, Meyer & Frank, a broker-dealer in Los Angeles.

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Q Was all his experience in the securities field?

A As far as I know, yes.

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Q Is Chancellor Management a fund similar to Competitive Capital?

24

A No.

25

Q Is it a fund?



Markizon

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A No.

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Q What is it?

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A It's an investment advisor.

5

Q Did there come a time when Mr. Randolph  
recommended certain prospective portfolio managers?

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A Yes.

8

Q To the Board of Directors?

9

A Yes.

10

Q Can you tell us, sir, what Board meeting that was?

11

A On June 25th, 1970, Mr. Randolph made those  
recommendations to the Associates Board.

12

13

Q Whom did he recommend at that time, sir?

14

A Shaw, Ralph Shaw, who would form Shaw Management  
Corporation, and Akiyoshi Yamada, who would form Takara  
Asset Management Corporation.

15

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Q Did he recommend anyone else?

18

A No, sir.

19

Q Were you present at that Board of Directors  
meeting?

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A Yes, sir.

22

Q Was Mr. Randolph a member of the Board at that  
time?

23

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A No, sir.

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Q Can you tell us who comprised the Board of

Markizon

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Directors?

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A Richard Boesel, Robert Sprinkel and Arthur J. C.

4

Underhill.

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Q At that time, did the Board consist of three

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members?

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A Yes, sir.

8

Q Was Mr. Randolph's presentation oral?

9

A Yes -- I'm sorry -- both oral and written.

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Q The written presentation, do you have a copy of

11

that?

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A It's attached to the June 25 Board meeting

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minutes.

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Q Mr. Markizon, I show you a copy of the minutes

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of the meeting of the Board of Directors of Competitive

16

Associates, Inc. of June 25, 1970, and ask you if this is

17

a true copy?

18

A Yes, sir.

19

MR. SUAREZ: May we have that marked, please?

20

(Copy of the Minutes of the Board of Directors

21

Meeting, dated June 25, 1970, referred to above,

22

was marked as Defendant Smith's Exhibit 9 for

23

Identification.)

24

Q Mr. Markizon, I show you Defendant Smith's

25

Exhibit 9, particularly the third paragraph wherein it



Markizon

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states that a copy of the performance record of each manager is attached, and ask you, sir, if there is a copy of the said performance records attached to this exhibit.

A Yes, in the written presentation that's attached thereto, there is a description of the performance of the two portfolio managers that were being recommended.

Q Would you tell us, please, who prepared these minutes?

A The minutes?

Q Yes, sir.

A I think Mr. Risman did.

Q Can you tell us, please, who prepared the performance records?

A You mean who prepared the document that's attached to the minutes?

Q Yes, sir.

A Mr. Randolph.

Q At the meeting of June 25th, was there discussion regarding the two proposed portfolio managers?

THE WITNESS: Sorry. Try that, again?

(The pending question was read by the reporter.)

A Yes.

Q At that meeting, was any financial document of the proposed portfolio managers submitted to the Board?

Markizon

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A No, sir.

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Q To the extent that written documentation regarding the proposed portfolio managers was presented, it was only the attached document to the minutes?

5

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A Yes, sir.

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Q Besides the three members of the Board you've mentioned, Messrs. Boesel, Sprinkel and Underhill, and yourself, who else was present at that Board of Directors meeting?

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A Randolph, Risman, Landau, Levin, Raychel.

The only other persons I suspect would be noted on the front of the minutes.

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Q I show you the copy of the minutes.

A Philip Smith, and, of course, all three directors.

You opened the question with that, yes.

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Q Mr. Markizon, is Mr. Boesel an attorney?

A No, sir.

Q Is Mr. Sprinkel an attorney?

A No, sir.

Q Mr. Underhill?

A No, sir.

I say that as to all three. I have never known them to be attorneys.

Q Just to your own knowledge, right?



Markizon

79

1 even if he was doing well, maybe didn't want to handle any  
2 more assets or maybe couldn't handle any more assets, so  
3 the Fund manager ought to be in a position to allocate  
4 assets rather than have a strict formula do it.  
5

6 Also, the incentive fees in the Fund prior to  
7 that time had been on an "all or nothing" basis. In other  
8 words, if you did extremely well, you got the whole  
9 incentive fee. If you did only -- if you were better than  
10 average but only slightly so, you might get no incentive  
11 fee, and the temptation was for portfolio managers to take  
12 high risks and go for the whole incentive fee, and that was  
13 eliminated at this time.

14 Q Would it be fair to describe your last statement  
15 as "home run hitting"?

16 A That term has been used.

17 Q Under the bylaws of the corporation, was the  
18 Board of Directors empowered to change the portfolio  
19 managers?

20 A I know nothing in the bylaws that would restrict  
21 that.

22 Q Was the proposed change in portfolio managers  
23 reported to stockholders?

24 A It was voted on and ratified by the stockholders.

25 Q Did the corporation prepare a proxy statement?

Markizon

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A Yes, sir.

Q Mr. Markizon, I show you a copy of a letter to shareholders of Competitive Capital Fund and Competitive Associates, Inc., dated September 11, 1970, to which is attached a notice of special meeting in lieu of the annual meeting of shareholders to be held September 30, 1970, and a proxy statement consisting of twenty-five pages, and ask you if that is what was sent to the stockholders.

A Yes, sir.

MR. SUAREZ: May we have that marked, please?

(The copy of the letter, referred to above, dated September 11, 1970, and attached documents, were marked, collectively, as Defendant Smith's Exhibit 10 for Identification.)

Q On Page 6, I believe, you will find some brackets about the name Takara Asset Management Corp., and I ask you, sir, do you know who put that bracket on?

A No, sir. There is also a line through one of the words, "Takara," in that sentence, which I am not familiar with, either.

MR. MARSHALL: I think the record should note, also, Mr. Suarez, that, as I understand it, anyway, this document was obtained by you, not through our files or not through us, but otherwise.



Markizon

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2 Q Mr. Markizon, where was the Board of Directors  
3 meeting of June 25th, 1970 held?

4 A Beverly Hills, California.

5 Q Was this a joint meeting of both plaintiff  
6 corporations?

7 A Yes, sir -- no, I'm sorry -- the answer is no.

8 Q Which of the plaintiff corporations meeting --

9 A Competitive Associates, Inc.

10 Q Was Yamada present at that meeting?

11 A No, sir.

12 Q Between June 25, 1970 and September 11, 1970,  
13 were there any Board of Directors meetings of Competitive  
14 Assets?

15 A Competitive Associates?

16 Q I'm sorry. Associates, yes.

17 A No, sir.

18 Q Was there any meeting of any committee dealing  
19 with the proposed future portfolio managers?

20 A No, sir.

21 Q Now, sir, Defendant Smith's Exhibit 10 makes  
22 reference to Competitive Capital having issued a press  
23 release on July 6, 1970 announcing the proposed changes in  
24 portfolio managers.

25 Do you have a copy of the press release, sir?

Markizon

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A I don't believe so.

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Q Do you know in what papers that press release was published?

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A No, sir.

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Q Do you know if it was published in The Wall Street Journal?

8

9

A It may have been. I just don't know. I just don't recall.

10

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Q Can you tell me, sir, who prepared the letter to the shareholders?

12

A That letter?

13

Q Yes, sir.

14

A September 11th letter?

15

Q Yes.

16

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A Prepared in conjunction with myself and outside counsel.

18

19

Q Now, reference is made therein to five proposed portfolio managers; correct, sir?

20

A Yes, sir.

21

Q Is Takara Asset one of them?

22

A Yes, sir.

23

Q Who are the other four?

24

25

A Shaw Management Corporation, Takara Management Corporation -- Takara Management something, at any rate --



Markizon .

83

Bernstein, Macaulay, Inc. and Argent Management Corporation.

Q Of the five corporations you have just mentioned, which were to be considered as portfolio managers for Competitive Associates?

A Takara and Shaw.

Q For whom would the other three --

A Competitive Capital Fund.

Q Sir, on Page 6, under "Approval or disapproval of the new portfolio managers," there is reference to Takara Asset Management Co., Inc. having been incorporated in July of 1970, correct?

A Yes, sir.

Q In the letter to the stockholders, particularly Paragraph 3, reference is made to checking the proposed portfolio managers over the previous six quarters; is that correct?

A Yes, sir.

Q And the letter is dated September 11th, 1970?

A That's correct.

Q Takara Asset Management Corp. was not in existence for a year-and-a-half, was it?

A That's correct.

Q Looking at this document again, sir, is the same true about Shaw Management Corp.?

Markizon

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MR. MARSHALL: Could you clear up the question, please?

Q On Page 6, it sets forth that Shaw Management was incorporated in about July of 1970, and on Page 1, or the letter to stockholders, reference is made to having checked on the previous six quarters as to said proposed portfolio managers' past performance.

A It says that Shaw Management Corporation was incorporated in June of 1970, yes, sir.

Q And then the letter makes reference to said corporation's previous six quarters' operation, also, does it not?

A That's correct.

MR. MARSHALL: May I see that exhibit, please?

MR. SUAREZ: Sure.

Q Prior to June 25, 1970, was Competitive Capital or Competitive Associates, or any of its officers censured by the Securities and Exchange Commission?

A You are talking about Competitive Capital Corporation?

Q Yes, sir, or Associates.

A No, sir.

Q Mr. Markizon, was any predecessor of plaintiff corporations censured by the Securities and Exchange



Markizon

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Commission?

MR. MARSHALL: I don't understand what you mean by "predecessor."

Q Were Mr. Boesel or Mr. Sprinkel censured by the Securities and Exchange Commission?

A No, sir.

Q Were they the subject matter of any investigation of the Securities and Exchange Commission?

A Yes, sir.

Q Did they consent to an order?

A Yes, sir.

Q Will you tell us when that was, sir?

A The order was sometime after July 1970, I'm not sure. My guess was it was in 1970, late in the year.

Q Can you tell us what the order provided for?

A Ten days suspension from being affiliated with a broker-dealer.

I don't have -- I also don't represent that I know all the background of all the people you included in your question. Your original question responded "any officers, directors, of all predecessor companies before July 1970."

Needless to say, I'm not aware of all the backgrounds of all these people.

Markizon

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1 Q No, I have limited it to the two gentlemen.

2 A O. K., but I'm sorry, your original question --

3 Q I understand that. You were at the Securities  
4 and Exchange Commission at the time, were you?

5 A At what time?

6 Q In 1969?

7 A Yes, sir.

8 Q Did you have anything to do while at the  
9 Securities and Exchange Commission with the investigation  
10 which led to the order involving Messrs. Boesel and  
11 Sprinkel?

12 A No, sir.

13 Q On September 30, 1970, was there a stockholders  
14 meeting?

15 A One was convened.

16 Q Where was that, sir?

17 A Beverly Hills, California.

18 Q And were the items contained in the proxy  
19 statement voted upon?

20 A No, sir.

21 Q Would you tell us the reason there was no vote?

22 A Yes. There was no quorum.

23 Q Do your records indicate how many stockholders  
24 did, in fact, attend either by proxy or in person?  
25



Markizon

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A Just the September 30 meeting?

Q Yes, sir.

A I don't believe so.

Q Was anything discussed at the meeting of September 30th, 1970?

A Yes, sir.

Q Were the proposed portfolio managers discussed?

A Yes, sir.

Q Can you tell us what other subjects were discussed?

A I think the restructuring or the new concepts that I described before that were described at the Board meeting were also described at the shareholders meeting.

Q Was a new date selected or suggested for the stockholders meeting?

A Yes, sir.

Q What was the new date?

A I don't know if there was a date in between then and October 7, but one adjournment was clearly to October 7th.

Q At the stockholders meeting of September 30th, 1970, who chaired the meeting?

A Mr. Risman.

Q Was Mr. Randolph present?

A Yes, sir.

Markizon

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Q Who made the presentation regarding the proposed portfolio managers?

4

A Mr. Randolph.

5

6

7

Let me correct that. I think I chaired that meeting. Randolph really made the presentation about the managers, but I think I chaired it.

8

Q Was Mr. Risman present?

9

A I think he came in in the middle of the meeting.

10

Q Was a stockholders meeting held on October 7th?

11

A No, sir.

12

Q Was this, again, because of lack of a quorum?

13

A Yes, sir.

14

Q Was a new date fixed?

15

16

A Yes -- well, the next -- I don't know if one was picked, but there was another meeting held.

17

Q When was the meeting held?

18

A October 9.

19

Q And was a quorum present on October 9th?

20

A Yes, sir.

21

22

Q Was there a Board of Directors meeting on September 30, 1970?

23

A No, sir.

24

25

Q Was there a Board of Directors meeting on October 7th?



Markizon

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2

A No, sir.

3

4

Q Was there a Board of Directors meeting on  
October 9th?

5

A Yes, sir.

6

Q Where was the stockholders meeting held?

7

A Beverly Hills, California.

8

Q Where was the Board of Directors meeting held?

9

A New York City.

10

11

12

Q When you speak about the Board of Directors  
meeting in New York City, can you tell us, sir, at whose  
office?

13

A The offices of Lawler, Sterling &amp; Kent.

14

Q Were you present at the stockholders meeting?

15

A Yes, sir.

16

17

18

Q Mr. Markizon, I show you Defendant Smith's  
Exhibit 8 for Identification, the contract with Takara,  
and ask you, sir, when was that executed?

19

A I don't know.

20

Q Was it executed before the meetings?

21

A No.

22

Q Was it executed after the meetings?

23

MR. MARSHALL: You are talking about the

24

October 9 meeting now?

25

MR. SUAREZ: Yes.

Markizon

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1  
2 A My recollection is that it was done shortly,  
3 either concurrently or shortly after we received it,  
4 shortly thereafter, but I'm not sure.

5 Q When you say concurrently when you received it --

6 A I believe the document was executed shortly  
7 thereafter the meeting -- shortly after the Board meeting  
8 was held.

9 Q When you say "shortly," sir, are you speaking of  
10 days or hours?

11 A Days.

12 Q Shortly after October 9, 1970, did you personally  
13 visit New York?

14 A No. What do you mean shortly?

15 Q Well, within a few days?

16 A No.

17 Q Prior to receiving this document, did you visit  
18 New York?

19 A No.

20 Q Sir, is that your signature on the left-hand side?

21 A It is.

22 Q On the last page?

23 A It is.

24 Q Were you present when Mr. Yamada signed it?

25 A I don't believe so.



Markizon

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1

Q Did you attest his signature?

2

3

A No, sir.

4

Q Were you present when Mr. Risman executed it?

5

A Yes, sir.

6

Q And you attested his signature?

7

A Yes, sir.

8

Q Were you present when Mr. Latimer executed it?

9

A Yes, sir.

10

Q And you attested his signature?

11

A Yes, sir.

12

Q On October 9th, were both these gentlemen,

13

Risman and Latimer, in California?

14

A No, sir.

15

Q They were in New York?

16

A One of them was.

17

Q Which one was in New York?

18

A Risman.

19

Q Where was Mr. Latimer?

20

A I don't know. My recollection is he would be  
in California, but I have no way of knowing where he was  
on October 9th.

21

22

23

Q What time was the stockholders meeting on

24

October 9th?

25

A Sometime in the morning.

Markizon

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1  
2 contained therein.

3 Q Well, I am referring to your letter dated  
4 July 7, 1970.

5 A I understand.

6 Q Obviously, whatever had been presented  
7 by Randolph at the board on June 25 in that respect was  
8 not satisfactory; isn't that right?

9 A No, I don't think that is so obvious. Because  
10 to a large extent this was a form letter that had been  
11 put together, sent to all five portfolio managers over  
12 Competitive Capital Fund and Associates, with certain  
13 of the paragraphs changed to reflect specific situations.

14 Q Did you ever tell Mr. Yamada that you were  
15 not interested in this information?

16 A No.

17 Q Did he ever give you the information after  
18 July 7, 1970?

19 A At the January meeting of the Board of Directors  
20 he went into some of the information that would be in  
21 response to that question.

22 Q Well, will you point out to me on  
23 Exhibits 8 or 9 the paragraphs that you have in mind.

24 A In Paragraph -- the first full paragraph on  
25 page 3 of that memorandum, Mr. Boesel inquired about the



Markizon

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1 size of Armstrong and the -- the minutes indicate he  
2 inquired about the size of Armstrong and it indicates  
3 a response by Mr. Yamada on that point.  
4

5 And I also recall, although I don't see  
6 it in the minutes, that he discussed the size of his  
7 partnerships and who were investors in them.

8 On the fifth page of that exhibit, there  
9 is a statement that Mr. Yamada had discussed his partner-  
10 ship and indicates that John Burns would be a limited  
11 partner and it is my recollection that he also dis-  
12 cussed the names of other people that were in the  
13 partnership with him.

14 Q You are now referring to the fourth full  
15 paragraph on page 5 of Exhibit 9 for identification?

16 A That is correct.

17 Q Are there any other portions of  
18 Exhibits 8 or 9 in which Mr. Yamada gave the inform-  
19 mation that you requested at page 5 of your July 7  
20 letter, Exhibit 7 for identification, which I quoted  
21 to you a few moments ago?

22 A No.

23 Q When you referred to the private partner-  
24 ships, were you referring to Takara Partners and  
25 Armstrong Investors? I am referring now, again, to

1  
2 page 5 of Exhibit 7, the third full paragraph on that  
3 page.

4 A I don't think Armstrong Investors was a private  
5 partnership. I think Takara Partners was the only  
6 private partnership.

7 Q And the off-shore fund, what were you  
8 referring to there?

9 A I think Armstrong Investors was the off-shore  
10 fund.

11 Q Did you ever learn the approximate number  
12 of investors in Takara Partners?

13 A I have seen a list of the partners, so obviously  
14 the answer is yes.

15 Q And when did you see that list?

16 A The list was an attachment to the June 12 letter.  
17 So whenever I saw that I saw the list of the partners.

18 Q Anyway, as you testified before, that was  
19 after May of 1971?

20 A No, I testified -- that is not so, I testified --

21 Q When Mr. Yamada left.

22 A Oh, I'm sorry. That's right.

23 Q And did you ever see a list showing the  
24 size of the investments of the partners of Takara  
25 Partners prior to May 1971 when Mr. Yamada left the



Markizon

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employ of Competitive Associates?

A I said before that on June 25 Mr. Randolph made his presentation to the board. He indicated, or his written presentation indicated, the size of the assets in Takara Partners.

Q The question that I asked is whether you saw the size of the investments of the partners of Takara Partners.

A No.

Q Prior to the time that Mr. Yamada left.

A I'm sorry. No.

Q And did Mr. Yamada ever advise you of the approximate number and size of his private clients?

A Not that I can recall at this time.

Q Now, in Exhibit 7, at pages 1 and 2, there are a number of restrictions which you advised Mr. Yamada had been adopted by the shareholders of Competitive Associates, and they bear numbers 1 through 10 on pages 1 and 2 of Exhibit 7.

Do you see what I am referring to?

A Yes, sir.

Q Did anyone ever check that Mr. Yamada was following these restrictions that are set forth at pages 1 and 2 of Exhibit 7?

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - X

COMPETITIVE CAPITAL CORPORATION	:	72 Civ. 1986 T.P.G.
and COMPETITIVE ASSOCIATES INC.,	:	
	:	
Plaintiffs,	:	COUNTER-STATEMENT
	:	<u>PURSUANT TO RULE 9(g)</u>
-against-	:	
	:	
AKIYOSHI YAMADA, et al.,	:	
	:	
Defendants.	:	
	:	
- - - - -	:	X

RESPONSE TO MOVANTS'  
9(g) STATEMENT

1. Admit paragraph 1 except deny that Competitive Capital is presently the fund manager of Competitive Associates (now Seaboard Leverage Fund).
2. Deny paragraphs 8 and 9.
3. Deny paragraph 10, except admit that Mr. Randolph interviewed Mr. Yamada, and that Mr. Randolph received a letter dated June 12, 1970 from Mr. Yamada, which letter speaks for itself.
4. Deny paragraphs 11 and 12, except admit that Takara Management commenced acting as portfolio manager for a portion of the portfolio of Competitive Associates as of October 9, 1970.
5. Deny paragraph 13, except admit that Mr. Randolph did most of the pre-retention investigation of Mr. Yamada on behalf of Competitive Associates.
6. Admit paragraph 14, except deny that Takara Management was a portfolio manager for Competitive Associates on May 14, 1971.



7. Deny knowledge or information as to paragraphs 15 and 16, except admit that the minutes of the meetings of the Board of Directors of Competitive Associates do not refer to the financial statements of Takara Partners.

TRIABLE ISSUES OF FACT AS TO  
LKH&H, DEAR, MARTINO

A. Were the certified financial statements of Takara Partners false and misleading in one or more material respects.

B. Did the certified financial statements of Takara Partners fail to disclose material facts.

C. With respect to common law counts, did LKH&H, Dear, or Martino know, or should they have known, that the financial statements of Takara Partners were false and misleading or failed to disclose material facts.

D. With respect to common law counts, did plaintiffs rely, directly or indirectly, upon the financial statements of Takara Partners.

Dated: April 2, 1974  
New York, New York

LAWLER, STERLING & KENT and  
BUTOWSKY, SCHWENKE & DEVINE

By

S. P. Klein-Marshall

Attorney for Plaintiffs

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New York, New York

212-736-7050

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New York, New York

212-725-5360



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
COMPETITIVE CAPITAL CORPORATION and  
COMPETITIVE ASSOCIATES, INC.,

Plaintiffs,

-against-

AKIYOSHI YAMADA, LAVENTHOL, KREKSTEIN,  
HORWATH & HORWATH, MORTON DEAR,  
ROBERT E. BIER, THOMAS MARTINO, JR.,  
TAKARA ASSET MANAGEMENT CORPORATION  
and IRA N. SMITH,

Defendants.

Index No.  
72 Civ. 1986 (TPG)

REPLY  
AFFIDAVIT

----- x  
STATE OF NEW YORK )  
                              : SS.:  
COUNTY OF NEW YORK )

MICHAEL LESCH, being duly sworn, deposes and says:

1. I am a member of the firm of Shea Gould Climenko & Kramer, attorneys for defendant Laventhol, Krekstein, Horwath & Horwath (hereinafter referred to as "LKH&H") in the above-entitled action. I submit this affidavit in reply to the affidavit of S. Pitkin Marshall, Esq. sworn to on April 2, 1974 and in support of the motion of defendant LKH&H for summary judgment.

2. In my main affidavit in support of defendant LKH&H's motion for summary judgment, I made the following statement (Affidavit of Michael Lesch, sworn to on February 26, 1974, pp. 4-5):

"7. I believe that none of the facts hereinafter set forth are in dispute. They are based entirely upon (1) Mr. Markizon's testimony at pretrial depositions herein, (2) plaintiffs' answers dated September 25, 1973 to the Interrogatories of defendant LKH&H and (3) the testimony of J. Robert Randolph, president of plaintiffs at all relevant times herein, in proceedings before the Securities and Exchange Commission on May 10, 1971. Rather than burden the Court with copies of transcripts of the entire testimony of Messrs. Markizon and Randolph, the exhibits then marked and plaintiffs' responses to interrogatories, I have quoted relevant material and set forth in parenthesis references to the underlying documents for all statements of fact. Should there be any dispute as to the accuracy of such references or should the Court request copies of the relevant underlying documents, they will be furnished to the Court." (Footnote omitted.)

3. Although plaintiffs have not submitted an affidavit of any person having knowledge of the relevant facts to contradict the statements contained in my moving affidavit, they have served a "Counter-Statement Pursuant to Rule 9(g)" wherein they purport to deny various statements of fact contained in defendant LKH&H's Rule 9(g) Statement. Accordingly, I have annexed hereto and marked as the following exhibits copies of those documents which further support defendant LKH&H's Rule 9(g) Statement:

Exhibit E - copies of pages 5, 8-10, 12, 14, 15, 23, 24 and 38-40 of the transcript of the testimony of J. Robert Randolph given before the Securities and Exchange Commission on May 10, 1971 which support defendant LKH&H's 9(g) Statement but were not quoted in my moving affidavit.

Exhibit F - a copy of the write-up submitted by Mr. Randolph to the board of directors of Competitive Associates, Inc. (Randolph Ex. 1



before the SEC; Ex. 5 of Markizon deposition herein.)

Exhibit G - a copy of the minutes of the meeting of the board of directors of Competitive Associates, Inc. on October 9, 1970 (Ex. 19 of Markizon deposition herein).

Exhibit H - a copy of the minutes of the meeting of the board of directors of Competitive Associates, Inc. on May 12-13, 1971 (Ex. 20 of Markizon deposition herein).

4. The above exhibits further demonstrate the frivolous nature of plaintiffs' purported denials of paragraphs 8-9 and 11-15 of defendant LKMH's 9(g) Statement as follows:

Rule 9(g) Statement Paragraph 8. Mr.

Randolph testified that the portfolio selection period started in approximately April of 1970 (Ex. "E", Randolph Tr. at pp. 14-15).

Rule 9(g) Statement Paragraph 9. Mr.

Randolph testified that he contacted about 40 management companies in selecting new portfolio managers and that he ultimately selected five, three for Competitive Capital Fund and two for Competitive Associates, Inc. (Ex. "E", Randolph Tr. at pp. 9-10).

Rule 9(g) Statement Paragraph 11. Mr.

Randolph testified that Randolph Exhibit "1" was his proposal to the board on the selection of new managers (Ex. "E", Randolph Tr. at pp. 12, 23-24; Ex. "F").

Rule 9(g) Statement Paragraph 12. The minutes of the board of directors meeting of October 9, 1970 of Competitive Associates, Inc. contain a resolution authorizing the president of the Fund to sign the portfolio manager agreements (Ex. "G", p. 3).

Rule 9(g) Statement Paragraph 13. Mr. Randolph testified as to the steps he took in selecting the new portfolio managers to be recommended (Ex. "E", Randolph Tr. at pp. 23-24).

Rule 9(g) Statement Paragraph 14. The minutes of the board of directors meeting of Competitive Associates, Inc. on May 12-13, 1971, contain a resolution of the board to request the resignation of Takara Asset Management Corp. (Ex. "H", p. 9).

Rule 9(g) Statement Paragraph 15. In addition to Mr. Randolph's testimony specifically denying that he had seen the 1969 year-end statement for Takara Partners which is quoted in my moving affidavit (p. 9), Mr. Randolph also described the documents which he did see (Ex. "E", Randolph Tr. at pp. 38, 39-40).

5. The evidence set forth above and in my main affidavit is not contradicted by deposition testimony or an affidavit by any person having knowledge of the facts herein. As shown in defendant LKH&H's accompanying reply memorandum of law by reference to



the evidence before the Court, plaintiffs' denials are frivolous or reflect immaterial variations from the undisputed evidence and, based on the uncontradicted facts, defendant LKH&H is entitled to summary judgment.

WHEREFORE it is respectfully requested that the motion of defendant LKH&H for summary judgment be granted in all respects.

*Michael Lesch*

MICHAEL LESCH

Sworn to before me this  
4<sup>th</sup> day of April, 1974.

*Frederick H. Hatcher*

Notary Public, State of New York  
No. 31-1200575  
Qualified in New York County  
Commission Expires March 30, 1975

1 Q How do you spell Summerfield?

2 A S-u-m-m-e-r-f-i-e-l-d. 5

3 Now, at the end of this month I will be moving.

4 Q Are you presently employed?

5 A Yes, I am.

6 Q In what connection?

7 A I am President of Chancellor Management Corporation,  
8 as well as Competitive Capital Corporation and Admiralty Fund.

9 Q What is your business address?

10 A 1900 Avenue of the Stars.

11 Q It is my understanding that Mr. Smith is appearing  
12 with you today as your counsel.

13 A That is correct.

14 Q Are you an officer or director of any other cor-  
15 porations presently?

16 A I am a director of the Income Fund of Boston and  
17 the management companies affiliated with the fund, such as  
18 Allstate Management Company, Competitive Capital Fund, Com-  
19 petitive Associates Fund.

20 I am President of all those organizations except  
21 the Income Fund of Boston of which I am Executive Vice President.  
22 I am a director of all of them, too, of the respective manage-  
23 ment companies.

24 Q How long have you been president of Chancellor  
25 Management?



1  
2 Q Competitive Capital was then subsequently sold and,  
3 during that period of time when I was managing money for  
4 Competitive Capital, I got rather close to the people at  
5 Competitive Capital Corporation, primarily Boesel and Bob  
6 Sprinkel. Competitive Capital Corporation then being sold,  
7 I had discussions and agreed to join Bob Sprinkel in setting  
8 up Chancellor Financial of which Chancellor Management was a  
9 subsidiary company.

10 Because of a difficult market environment and inability  
11 to raise money for operating purposes and so forth, Chancellor  
12 Management was then sold to the Seaboard Corporation in April  
13 of 1970. I then assumed control of the Admiralty Fund as  
14 President, Executive Vice President of the Income Fund of Boston  
15 and, in June of that year, I became President of Competitive  
16 Capital Corporation and Competitive Capital Fund and Associates,  
17 Inc.

18 Q Was your being named President of Competitive Capital--  
19 was this related to the problems of performance that the funds  
20 under Competitive Capital --

21 A It was related to the problems of performance  
22 primarily for all of the Seaboard funds -- Admiralty's perform-  
23 ance was not adequate, as Competitive Capital's or Associates'  
24 was not adequate.

25 MR. RODE: Off the record.

(Discussion off the record.)

1 MR. RODE: Back on the record.

2 BY MR. RODE:

3 Q As I understand it, soon after becoming President  
4 of Competitive Capital, you made a decision to, or a decision  
5 was made to change the portfolio manager's funds under  
6 Competitive Capital's management.

7 A That is correct.

8 Q Can you explain for the record how you went about  
9 selecting new portfolio managers?

10 A Basically, I had gone to some of the larger and well-  
11 known investment banking firms and three or four of the  
12 firms where there were large institutional orders and I primarily  
13 went to these people and asked them who, in the last two years,  
14 had done a sound job of buying and selling stocks in terms of  
15 buying the right stocks, selling the right stocks and so forth.

16 They gave me names and so forth and I then contacted  
17 those management companies which numbered about 40. I then  
18 narrowed it down to 25.

19 Q How many institutions did you contact in the first  
20 instance to get recommendations?

21 A I would say about 15 firms -- they were Solomon Brothers  
22 Eberstadt, Jefferies -- firms of that nature.

23 Q You say you interviewed about 25 prospective members.

24 A That's correct.

25 Q Out of those, you selected how many -- 7?



1 A We selected 5.

2 Q Three were for Competitive Capital and two were for  
3 Competitive Associates.

4 A That's correct.

5 Q In interviewing these people, was there a typical  
6 set of questions you asked them?

7 A I had some general parameters which caused me to  
8 narrow it down to 25 from 40. A lot of these parameters were  
9 based upon experiences that I had had when I was a manager.  
10 I felt they created, or could possibly create, a problem for  
11 management and I wanted to eliminate some of these problems  
12 and structure it a little differently for the portfolio  
13 managers themselves.

14 Within those parameters that narrowed it down to  
15 25. Beyond the 25, I was more concerned with how they got  
16 their performance -- whether it was with issues, planned mergers.  
17 In other words, how the performance was realized and in what  
18 kinds of stocks - whether it was over the counter stocks, whether  
19 it was listed stocks. I was more concerned with how performance  
20 was realized and also in terms of the decision making process,  
21 whether it was one guy off in a corner making all the decisions  
22 or whether he had an organisation behind him and so forth.

23 Q I have a document which was previously submitted to  
24 this staff by Mr. Smith. It was actually submitted to Mr.  
25 Gross of the Enforcement Office, Inc. on the selection of new

1 I have taken the first two pages off what I had previously  
2 denoted as Randolph Exhibit 1, since it is my understanding  
3 this was prepared at a separate time.

4 BY MR. RODE:

5 Q Mr. RAndolph, are you familiar with the document  
6 I have had marked as Randolph Exhibit 1?

7 A Yes, I am.

8 Q Can you tell me the occasion for its preparation?

9 A This was prepared for the June 25 board meeting of  
10 Competitive Capital and Competitive Associates.

11 Q For what purpose?

12 A It was my proposal to the board on the new managers,  
13 on the selection of new managers.

14 Q Where did you get the -- this document comprises a  
15 number of write-ups on the background and performance of the  
16 proposed managers.

17 Can you explain to me the source of your information  
18 generally?

19 A In all cases the source of the information came from  
20 the people within these organizations.

21 Q When you say, "Came from", with regard to Argent  
22 Management, for instance, did you receive a written submission  
23 from them concerning these facts?

24 A It was either written or in published form in the  
25 Institutional Investor Magazine.



1 managers. This was my first knowledge of Takara Partners.  
2

3 It was because of this knowledge that I had initiated  
4 and contacted Aky Yamada as to whether he would have an  
5 interest in being a portfolio manager on Competitive  
6 Associates.

7 Q Excelsior was to be underwritten by Competitive?

8 a Competitive Capital owned Excelsior Fund. It was  
9 going to be an off shore fund.

10 Q Do you know who was responsible for lining up Mr.  
11 Yamada for Excelsior?

12 A I believe it was Bob Sprinkel. I do not know that  
13 for a fact.

14 Q Was Excelsior ever offered to the public?

15 A No, it was not.

16 Q What was the date at which it was going to come out,  
17 or what was the time frame at which this proposal --

18 A Because of the financial problems of Competitive  
19 Capital, nothing was ever really -- never came to date.

20 They tried to sell the fund, they couldn't sell it.  
21 It just died.

22 Q When did you first contact Mr. Yamada.

23 A It was during this portfolio selection period where  
24 I was contacting a lot of people.

25 Q When did that period start?

A It started in, approximately, April of 1970, the

1 latter part of April.

2 Q Was your initial contact by telephone or by mail?

3 A The initial contact was by telephone.

4 Q How did the conversation go?

5 A I asked Aki whether he -- I identified myself; what  
6 my purpose in calling was and asked him whether he would have  
7 an interest in being one of the potential portfolio managers  
8 on Competitive Associates.

9 Q What was his response?

10 A He said yes.

11 Q What was your understanding of Mr. Yamada's business  
12 at that time?

13 A That it was a partnership managing approximately  
14 15 million dollars in toto.

15 Q What was the name of the partnership -- Takara  
16 Partners?

17 A Takara Partners.

18 Q What was the source of your information, your  
19 understanding?

20 A Basically, what was in the letter which I had Aki  
21 document to me in writing. Basically what the nature of our  
22 telephone conversation was and that the purpose of the letter  
23 was to document out conversation over the phone.

24 Q Let me stop you.

25 At the time you called Mr. Yamada, did you have an



1 A I have never talked to Mr. Galanis.

2 Q Have you ever met him?

3 A I have never met him.

4 Q How about Mr. Zachary?

5 A I have never met him or talked to him.

6 Q Now, there is a write-up, the last two pages of  
7 Randolph Exhibit 1 contain a write-up of Takara Partners which  
8 seems, to a large degree, to contain information presented in  
9 Randolph Exhibit 2, the letter from Aki Yamada. At least on  
10 the performance of Takara and on Armstrong Investors, S. A.

11 Is Randolph Exhibit 2 the source of the information  
12 contained in --

13 A Yes.

14 Q Exhibit 1.

15 Now as far as the biographical sketches which are  
16 appended thereto, what was your source there?

17 A That was taken from a prospectus that was provided  
18 me by Aki Yamada.

19 Q Is this the prospectus of Armstrong Investors?

20 A Yes, it is.

21 MR. SMITH: May we go off the record for a second?

22 MR. RODE: Yes.

23 (Discussion off the record.)

24 BY MR. RODE:

25 Q I have the document previously marked Yamada Exhibit

1 No. 1 for identification as of March 18, 1971.

2 It is an explanatory memorandum of Armstrong  
3 Investors, S. A., dated June 15, 1970.

4 Is this the document you referred to as being the  
5 source of the biographical information?

6 A Yes it is.

7 Q Were these resumes, in fact, just copied out of  
8 the memorandum?

9 A Yes, they were.

10 Q Now, this brochure indicates that Everest Management  
11 is the investment management of Takara Partners and is an  
12 investment partnership organized in July of '69 with assets  
13 of approximately 5 million dollars. This write-up indicates  
14 that Takara has assets of approximately 6 million dollars.

15 Now, I realize that the write-up was, say, 5 months  
16 subsequent to the issuance of this explanatory memorandum.

17 Did you have any conversations with Mr. Yamada  
18 about the discrepancy between the statement in his letter and  
19 the statement in the explanatory memorandum?

20 A I did not personally. I do believe that our in-house  
21 legal counsel -- this was brought up.

22 Q Did Mr. Yamada offer an explanation?

23 A I do not know the answer.

24 Q By in-ouse legal counsel, do you mean Mr. Markizan?

25 A Mr. Markizan.



1 and then returned to him?

2 A Yes. I did not return them to him. We reviewed  
3 them and sent them back.

4 Q Was this subsequent to your initial interview with  
5 Mr. Yamada? Were there two interviews with Mr. Yamada in  
6 New York?

7 A No, there was only one.

8 Q This was the one at the St. Regis, when you were  
9 interviewing people.

10 A Yes.

11 Q What sort of records were you reviewing, if you  
12 don't recall an audited statement.

13 Do you think you might have seen a statement that  
14 was audited?

15 Q I saw portfolio sheets, just as much as I brought  
16 to you today, on what his cost position was, what stocks he  
17 owned, what performance and so forth. What his beginning  
18 asset value was and what the market value of the portfolio  
19 was now.

20 These were not audited statements, just as the  
21 one I gave you this morning is not audited.

22 Q Do you recall -- did you see accounts other than  
23 Takara Partners, other than the limited partnership?

24 A For which Aki Yamada was responsible?

25 Q Yes.

(Mr. Green returned to the room.)

1 A No, I did not.

2 Q Did you consider that Takara Partners was the one  
3 that would be comparable in size to the one you were going  
4 to give them?

5 A Yes.

6 Well, there were some private accounts, as I recall.  
7 There were either three or four accounts of Aki's that he  
8 was responsible for in managing, or the primary manager on.  
9 It was my understanding that John Galanis was the back-up  
10 manager and those that John was responsible for, Aki was the  
11 back-up on. They worked closely together.

12 As I recall, there were three or four accounts of  
13 Aki's that he was managing that I reviewed.

14 Q These are the ones that are referred to as "several"  
15 in Randolph Exhibit 2. "Several private accounts totalling  
16 slightly over 8 million dollars."

17 A Yes.

18 Q Do you recall the names of any of those accounts?

19 A No, I do not.

20 Q With regard to Takara Partners, do you recall options  
21 as being a substantial part of the portfolio value?

22 A No.

23 Q Do you recall anything about the use of put options?

24 A No.

25 Q Do you recall seeing anything in the form of a year-end



1 statement?

2 A For which year?

3 Q Any year.

4 A No.

5 A Q I will show you a document which has previously  
6 been marked as Yamada Exhibit No. 24 as of May 5, 1971.

7 Have you ever seen that document?

8 For the record, I think on some occasions the first  
9 five or seven pages of this have been circulated separately.  
10 We are not certain of the back-up materials.

11 A I have not seen that.

12 Q Well, review it and then make a statement on it.

13 MR. GREEN: Let's go off the record.

14 (Discussion off the record.)

15 MR. RODE: On the record.

16 THE WITNESS: I have not seen that document.

17 MR. RODE: That is Yamada Exhibit No. 24 of May 5,  
18 1971, which is the '69 year-end statement for Takara Partners.

19 BY MR. RODE:

20 Q Did you see anything comparable, anykind of a  
21 balance sheet?

22 A No.

23 Q Subsequent to the issuance of the July 6th press  
24 release, and subsequent to the naming of Mr. Yamada as a  
25 portfolio manager for Competitive Associates, did you have

COPY OF WRITE-UP OF PROSPECTIVE PORTFOLIO MANAGERS GIVEN TO BOARD OF  
DIRECTORS BY RANDOLPH

*Dir. Randolph*  
*Exh #1*  
*J D 5/10/71*

COMMON ELEMENTS POSSESSED BY ALL NEW PROPOSED  
PORTFOLIO MANAGERS

- A. Where the decision-making process is free of any public conflicts of interest. Here we are concerned primarily with those organizations that have their own public vehicle. It is our belief that if their portion of Competitive Capital outperforms one's own Fund, it advertises that there is a better place for his shareholders to go with their money. This cannot be explained away by saying it is easier to manage a small pool of money than a larger one or that he can get better performance when he concentrates more. Such reasoning only documents the inherent superiority in the Competitive Capital concept. Likewise, a management company cannot invest both pools of capital the same way as then each have been encumbered by the greater assets which the other brings to it. With a firm with no public vehicle, Competitive Capital or Associates then becomes their showcase to the public -- providing a strong incentive.
- B. An investment philosophy that advocates intensive money management as opposed to "buy/hold blue chips" philosophy.
- C. A discipline system for taking profits and eliminating losses.
- D. The ability of that organization to attract, motivate and hold good people.



- E. The ability of that organization to concentrate one's energy on managing a portfolio and away from the day-to-day people, administrative and marketing problems.
- F. The ability and access of the organization to use a complete network of information and research.
- G. Where the decision-making process is centered with one individual but where this individual is able to inter-act with a small group of perhaps 3 or 4 people. Flexible investment decision-making procedures and the placing of responsibility with one individual are paramount.
- H. Where outstanding performance records (all documented) have been realized over the past two years.

## Competitive Capital Fund

### ARGENT MANAGEMENT CORPORATION (Sage Associates)

Date established -- end of 1968

Based -- New York City

Assets under management -- \$15 million

Performance -- 1970 -9%  
1969 +22.6%

Sage Associates is an investment partnership servicing clients desiring above-average capital appreciation.

For the year 1969, Sage Associates was one of the few partnership funds in the United States to show growth. Sage's portfolio manager achieved a 22.6% capital appreciation. This compares with declines in the Dow Jones Industrial Average of 15.2% and the Standard & Poor's Industrial Average of 10.2%. In previous years the manager of Sage has shown capital appreciations of as high as 110% on selected accounts which he was then managing on a discretionary basis. It is widely acknowledged that in 1969 performance funds of all sizes turned in disastrous operating results. Sage, then, exhibited very substantial capital appreciation in one of the most treacherous markets the nation has seen this decade.



Established a year ago, Sage Associates employs aggressive, flexible investment techniques in the management of its expanding securities portfolio.

Sage Associates' outstanding performance last year is directly attributable to the portfolio manager's policy of thoroughly researching each investment selection personally and maintaining continuing and close personal contact with key executives of the corporations.

Selection and management of investments are at the sole discretion of Joseph J. Pikul, 35, who began his Wall Street career in 1960 with the Standard & Poor's Corporation. It is coincidental that in 1959, he was the recipient of the Standard & Poor's Fellowship from Columbia University Graduate School of Business but chose to attend the Harvard Business School instead. Having joined Standard & Poor's as an analyst trainee, Mr. Pikul rapidly rose to Editor of the company's "Growth Stock Service" and was a member of the prestigious President's staff.

Mr. Pikul graduated Magna Cum Laude from Northeastern University in 1958, served as a Lieutenant with the U.S. Army Finance Corps, and attended the Harvard Graduate School of Business Administration.

Currently, he managed the investment funds of the MidAmerica Mutual Fund, competitively with Intercapital Corporation, a partially owned subsidiary of Standard & Poor's Corporation.

## Competitive Capital Fund

## BERNSTEIN-MACAULAY, INC.

Date established -- 1934

Based -- New York City

Assets under management -- \$250 million

Performance -- 1970  
1969 -1.54%

Bernstein-Macaulay is the investment management subsidiary of Cogan, Berlind, Weill & Levitt of which Peter Bernstein, Chairman of the Board, and Jim Ledbetter, President, will be the ones involved in supervising the management of Competitive Capital's funds of which employ the maximum growth principal to money management.

Peter L. Bernstein, Chairman of the Board

Mr. Bernstein, son of the founder of the firm, joined Bernstein-Macaulay, Inc., in 1951. He was born in 1919 and graduated from Harvard College with a magna cum laude degree in economics and membership in Phi Beta Kappa. He held responsible positions in the Research Department of the Federal Reserve Bank of New York and then with the Office of Strategic Services in Washington, D. C. He saw military service in the European Theater of Operations in World War II, reaching the rank of Captain. He taught economics at Williams College and then became economist and portfolio manager of the Amalgamated



Bank of New York. For three years prior to coming to Bernstein-Macaulay, Inc., he was portfolio manager and special assistant to Henry Morgenthau, Jr., at the Modern Industrial Bank of New York (now National Bank of North America).

Mr. Bernstein has served as consultant to both the New York Stock Exchange and the American Stock Exchange.

Mr. Bernstein lectures in economics and investments at The New School for Social Research. He is the author of "The Price of Prosperity" (Doubleday, 1962, and revised edition, Random House, 1966), and of "A Primer on Money, Banking, and Gold" (Random House, 1965; revised edition 1968). He is also co-author with Robert L. Heilbroner of "A Primer on Government Spending" (Random House, 1963). His articles have appeared in The Harvard Business Review, The New York Times, The Institutional Investor, and professional economic journals.

James E. Ledbetter, President

James Ledbetter was born in Atlanta, Georgia, in 1925, and graduated in 1951 from Emory University with the degree of Bachelor of Business Administration.

After wide experience in security analysis and portfolio management in banking and insurance, Mr. Ledbetter joined Investors Diversified Services in Minneapolis in 1961. In February, 1962, he became Manager of the IDS Investors Stock Fund (\$1.2 billion) and shortly afterward

shifted to Manager of the IDS Investors Variable Payment Fund. This fund had assets of about \$200 million in 1962 and was up to \$1.1 billion by 1968.

In July, 1968, Mr. Ledbetter left IDS to be President and a Director of a group of equity funds then being formed by Transamerica Corporation. He left Transamerica in July, 1969, to become President of Bernstein-Macaulay, Inc.



Competitive Capital Fund

CANTOR MANAGEMENT ASSOCIATES, INC.

Date established -- May, 1968

Based -- New York City

Assets under management -- \$125 million

Performance -- 1970 -10.4%  
1969 -10.7%

Cantor Management Associates is a traditional investment counseling firm with long term growth objectives. Its President, Richard Cantor, formerly headed Chase Manhattan Bank's \$4 million investment advisory division. In measuring risk against reward emphasis is placed on companies in the \$50-500 million annual sales range where significant changes can result in dramatic net earnings.

Background information on the people involved include:

Richard A. Cantor, age 37

Boston University, 1954, B.S. in Business Administration  
N. V. U., 1959, M.B.A.

Chase Manhattan Bank, 11 years, Vice President, Member  
of Investment Policy Committee, Division Executive of  
Investment Advisory Division, which had \$4 billion in assets.

L. Clark Ridgley, age 30

Harvard College, 1962, A.B.

Harvard Business School, 1965, M.B.A.

Chase Manhattan Bank, 3 years, Second Vice President,  
Senior Group Portfolio Manager in Investment  
Advisory reporting directly to Richard Cantor.

Nikos A. Pharasles, age 31

Rutgers University, 1963, magna cum laude, Phi Beta Kappa,  
Henry Rutgers Scholar, A.B.

Chase Manhattan Bank, 5 years, Second Vice President,  
Senior Group Portfolio Manager and Director of  
Marketing reporting to Richard Cantor.

Dan McCarthy, age 31

Cornell University, 1961, B.A.

Peace Corps, Chile, 1961-63

Cornell University, 1965, M.B.A.

Chase Manhattan Bank, 3 years, Investment Officer,  
Investment Research.

Richard L. Brooks, age 31

Mount Union College, B.A. 1960

University of California at Berkeley, 1962, M.B.A.

Chase Manhattan Bank, 1962-63, Investment Research,  
Financial Analyst.

Wells Fargo Bank, 1963-69, Second Vice President,  
Senior Analyst. Fund Manager -- Special Equity Fund  
for tax exempt institutions.

Mahlon R. Straszheim, Economic Consultant

Ph.D. Economics, Harvard University, Professor in  
Department of Economics, Harvard University.

Outside consultancies -- Cantor Management Associates,  
Federal Bureau of the Budget, Department of Transportation.



Competitive Associates

### SHAW MANAGEMENT COMPANY

Date established -- 1970

Based -- New York City

Assets under management -- newly created corporation to manage money for Competitive Associates

Mr. Ralph R. Shaw is presently a Vice President of Fleschner<sup>o</sup> Becker Associates, a private partnership with assets of approximately \$25.5 million, and of FBE Partners, a private partnership with assets of approximately \$9.5 million. During 1969, these two pools of money experienced a decline of 2.7% and for calendar 1970 to date, has experienced a decline of slightly over 15%. Because of legal complications with the two private partnerships, it is necessary that a separate corporation be established in order for the organization to manage money for Competitive Associates. The principal officers of the over-all organization include the following persons:

Malcolm K. Fleschner, Chairman of the Board. Mr. Fleschner, 1, holds a B.S. in Economics from the Wharton School of the University of Pennsylvania. Prior to 1956, he was self-employed in real estate and commercial activities. From 1956 through 1962, he was associated with Wertheim & Co. and, from 1962 to 1965, was Chairman of a

ew York Stock Exchange member firm. In mid-1956, Mr. Fleschner formed The Fleschner Company, the predecessor of Fleschner Becker Associates.

William J. Becker, President. Mr. Becker, 38, graduated cum laude from Brown University in 1953, where he was elected to Phi Beta Kappa. In 1955, he received an M.B.A. with Distinction from Harvard University Graduate School of Business Administration. From 1955 to 1966, Mr. Becker was associated with Wertheim & Co. as a securities analyst and institutional salesman. In April, 1966, Mr. Becker and Mr. Fleschner formed Fleschner Becker Associates.

Leon Pomerance, Executive Vice President and Treasurer. Mr. Pomerance, 54, was associated with Model, Roland Co. from 1953 to 1964. From 1964 to June, 1969, he was associated with H. Hentz & Co. where he created and supervised the Put and Call Option and Stock Loan Departments and serviced institutional accounts. Mr. Pomerance joined Fleschner Becker Associates in June, 1969. He is presently on the teaching staff of the New York Institute of Finance.

Ralph R. Shaw, Vice President. Mr. Shaw, 31, received an M.B.A. in Public Accounting from Hofstra University in 1959 and a J.D. degree from New York University School of Law in 1966. From 1966 to 1963 Mr. Shaw was a senior securities analyst with Standard & Poor's Corp. and in 1964 was a senior securities analyst with Paine, Webber, Jackson & Curtis. He was Manager of the Institutional Department of Coleman & Co.



from 1965 to 1966 and from 1966 to 1967 was with Wertheim & Co. as a senior securities analyst. Mr. Shaw was a Vice President and portfolio manager of Shareholders Management Company from 1967 to 1968.

Andrew K. Fleschner, Vice President. Mr. Fleschner, 27, graduated cum laude from Harvard College in 1964 and received an M. B. A. from Harvard University Graduate School of Business Administration in 1967. From 1967 to 1969 Mr. Fleschner was a securities analyst with Fidelity Management and Research Corporation.

## TAKARA PARTNERS

Date established -- July, 1966

Based -- New York City

Assets under management -- \$22 million

Performance -- 1970 +5.3%  
1969 +14.3%

Takara Partners are private money managers and do not at present manage public funds. They presently manage a domestic partnership with \$6 million in assets called Takara Partners. Takara was up 14.3% in 1969 and is presently up 5.3% for 1970. They also manage Armstrong Investors S. A., an offshore fund with assets in excess of \$8 million. The fund commenced operation on February 15th of this year with a net asset value of \$20 per share. Its net asset value is now \$21.64 or up 8.5%. Several private accounts are also under management totaling slightly over \$8 million. Armstrong Investors and the private accounts are managed by Everest Management Corporation, an unregistered investment advisor of which John Galanis and Aki Yamada are the principal stockholders. A biographical sketch of principal people of the organization includes:

Louis G. Zachary -- Chairman of the Board, President and Director

From 1945-1946, Mr. Zachary served in the U.S. Navy. He attend Harvard University from 1946-49, receiving the degree of Bachelor of Arts. He then attended the Columbia University Graduate School of Business from 1949 to 1951, from which he received the degree of Master of Business Administration. From 1951 to 1952, Mr. Zachary was employed at the Dewey & Almy Chemical Co., a division of W.R. Grace & Company, and from 1952 to 1966 he was



employed by Union Camp Corporation as general manager of its chemical division operations. In January, 1967, he joined Drake Management Inc. as Vice President of this newly created investment management company, which managed up to \$75 million of investment funds. In November, 1969, together with Mr. Yamada and Mr. Galanis, he organized the Investment Manager.

Akiyoshi Yamada -- Vice President and Director

Mr. Yamada was born in Tokyo, Japan, in 1942. He attended Washington and Jefferson College from 1960 to 1964, from which he received the degree of Bachelor of Arts. He then attended Harvard Business School from 1964 to 1965, from which he took a leave to work at Kuhn, Loeb & Co. At Kuhn, Loeb & Co. from 1965 to 1969, Mr. Yamada became senior analyst responsible for special situations and was named Assistant Vice President, the youngest in that firm's history. Additionally, he was responsible for foreign bank accounts on a discretionary basis. In June, 1969, Mr. Yamada left Kuhn, Loeb & Co. to form Takara Partners.

John Peter Galanis -- Vice President and Director

Mr. Galanis attended Syracuse University from 1959 to 1963, from which he received the degree of Bachelor of Arts; he then attended Boston University Law School from 1963 to 1965. In June, 1965, he joined Merrill Lynch, Pierce, Fenner & Smith, Inc. where he eventually was employed as an analyst serving primarily the larger institutional clients. During this period (1967) he served on a discretionary basis as Portfolio Manager of the Neuwirth Fund, Inc. In February, 1968, he joined the Neuwirth Fund on a full-time basis as Vice President and Portfolio Manager. During 1968, the Neuwirth Fund, with assets of approximately \$80 million, was the top performing U.S. mutual fund. Mr. Galanis also served as a Director of the Downtown Fund, a fund affiliated with Neuwirth Management. Mr. Galanis continues to serve as a Director of the Downtown Fund.

COMPETITIVE ASSOCIATES INC.  
MEETING OF THE BOARD OF DIRECTORS

October 9, 1970

A meeting of the Board of Directors of Competitive Associates Inc. (the "Fund") was held on October 9, 1970 at the office of Lawler, Sterling & Kent, 500 Fifth Avenue, New York, New York at 11:00 a.m. pursuant to written notice. Messrs. Richard E. Boesel, Jr. and Arthur J.C. Underhill, being two of the three duly elected directors, were present and thus a quorum was present. At the invitation of the Directors, Messrs. Michael Risman, J. Perry Smith, Jerome R. Randolph, Henry Homes, Jr., James B. Barron, Peter Landau, Meyer Eisenberg and Philip N. Smith, Jr. of Lawler, Sterling & Kent (counsel to the Fund Manager) and Messrs. Ezra Levin and Gerald Lerman of Marshall, Bratter, Greene, Allison & Tucker (counsel to the Fund) were also in attendance.

Mr. Randolph called the meeting to order and Mr. Risman acted as Secretary and kept the records of the meeting.

The minutes of the prior meeting of the Board held on on June 25, 1970 were distributed and the Board read and discussed the minutes and asked the Secretary to delete the proposal that the Fund Manager could manage assets of the Fund on an interim basis in an emergency. A motion was then made and seconded and it was unanimously

RESOLVED: That the minutes of the meeting of the Board of Directors of the Fund held on June 25, 1970 as corrected above, be and they hereby are approved.

The Board was then advised that the previously adjourned shareholders meeting had met, that a quorum had been present at the meeting, and that a majority of the votes of the shareholders had approved the resolutions proposed by management including the election of the slate of directors proposed in the proxy material to serve until the next annual meeting of shareholders and/or until their successors were chosen. The Board then welcomed the newly elected Directors -- Messrs. Risman, Smith, Randolph, Homes and Barron -- who took their seats as Directors and the meeting then continued.

DEF. EX. 19

FOR ID# 10-24-73

HARVEY H. KRAMER

REPORTER



Competitive Associates Inc.  
Meeting of the Board of Directors  
October 9, 1970

Page 2

Mr. J. Perry Smith then asked if election of officers to serve until the next shareholders meeting was in order. Assured that it was, Mr. J. Perry Smith then proposed the following slate of officers to serve until the next organization meeting of the Board of Directors and until their respective successors are elected and qualified, or as otherwise provided in the By-Laws of the Fund:

Jerome Robert Randolph	President
Michael Risman	Vice President
Alan R. Markizon	Secretary
Walter Latimer	Treasurer
David Servente	Assistant Treasurer

Upon motion duly made and seconded it was unanimously

RESOLVED: That each of the above named nominees be and they hereby are elected to the office set forth opposite his respective name to serve until the next organization meeting of the Board of Directors or until his successor is elected and qualified, or as otherwise provided in the By-Laws of the Fund.

Mr. Boesel then asked the Board to accept his resignation as Chairman of the Board. Upon motion duly made and seconded, it was unanimously

RESOLVED: To accept the resignation of Richard E. Boesel, Jr. as Chairman of the Board of Directors.

Mr. Smith then proposed that the Board adopt a policy of making no investments in "restricted securities" as defined in the Fund's most recent prospectus, unless prior written approval was granted by the Board of Directors. Upon motion duly made and seconded, it was unanimously

RESOLVED: That the Fund make no investments in restricted securities unless prior written approval thereof is granted by the Board.

Competitive Associates Inc.  
Meeting of the Board of Directors  
October 9, 1970

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Mr. Randolph requested that the Board authorize him to execute new Portfolio Manager and Fund Manager Agreements with newly appointed Portfolio Managers and with the Fund Manager.

Mr. Boesel asked about the supplemental letter attached to the proxy and the apparent inaccurate information given to the Board at their last meeting. Mr. Randolph assured him that notwithstanding the supplemental letter indicating an apparent misstatement, at the time of the previous Directors Meeting all such information was accurate and in no way misleading; it was only due to the timing of the press release and that the press release was distributed after the close of the second quarter which changed slightly certain facts as to performance of the Managers.

Mr. Randolph responded to questions as to the meetings between the Fund Manager and the new Portfolio Managers. Questions were raised concerning particularly Takara Management Company. Mr. Randolph discussed the resignation of one of their top managers but assured the Board that this would not severely hinder the capability of the company. Mr. Boesel then inquired about rumors of an investigation of Mr. Yamada. Mr. Eisenberg explained that while there had been rumors of some investments Mr. Yamada made in Hair Extension Center, no evidence had been uncovered of any wrongdoing or of anything irregular. Mr. Boesel then moved and Mr. Smith seconded the motion that was then unanimously

RESOLVED: That the President of the Fund be and hereby is authorized to sign on behalf of the Fund, the new Fund Manager and Portfolio Manager Agreements, in the form approved by shareholders at their annual meeting.

Mr. Levin raised the question concerning the reasonableness of the amount contributed by the Fund to pay the bills presented by Lybrand, Ross Bros. & Montgomery to the Fund, Competitive Capital Fund, Competitive Capital Corporation and The Seaboard Corporation. After discussion of the contribution made by each of the foregoing funds toward payment of the entire bill, a letter signed by officers of each of the funds addressed to counsel for the Fund was read to the Directors and a copy was ordered filed with the records of the Corporation. Counsel suggested that the Board appoint a committee to review the issues presented and



Competitive Associates Inc.  
Meeting of the Board of Directors  
October 9, 1970

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make a final determination on the matter, which would be binding on the Board. It was then unanimously

RESOLVED: That a two-man committee of Messrs. Boesel and Homes be and they hereby are authorized to review and determine the reasonableness of the contribution made by the Fund to the bill by Lybrand, Ross Bros. & Montgomery for professional services rendered to the Fund, Competitive Capital Fund, Competitive Capital Corporation and The Seaboard Corporation and that such determination shall be final and binding on the Board of Directors.

Mr. Eisenberg then was called upon to discuss the possible recapture by the Fund of commissions on transactions executed by The Seaboard Corporation's Pacific Coast Stock Exchange "PCSE" affiliates -- The Seaboard Funds Distributors, Inc. ("Distributors") and The Seaboard Planning Corporation ("Planning").

Mr. Eisenberg noted the Directors' duty to bargain on behalf of the Fund on such matters as the management contract and stated that Directors should consider any recapture arrangement in the light of management compensation generally and with a view to obtaining an equitable share of brokerage commissions for the Fund. Mr. Eisenberg discussed the different arrangements now in existence in other fund groups (e.g. IDS, Waddell & Reed).

It was pointed out that Judge McLean had approved the settlement in the Dreyfus case which could be interpreted to support the view that Management could keep the entire profit on Fund related brokerage. He advised the Board that, in his view, the Dreyfus settlement did not decide the issue of whether Management could refuse to negotiate a recapture arrangement with the Fund and certainly did not preclude the Fund from obtaining a portion of the commissions on transactions put through Seaboard's PCSE seats.

Competitive Associates Inc.  
Meeting of Board of Directors  
October 9, 1970

Page 5

The Board reviewed the types of brokerage available for return through offset against the Fund's advisory fee and, after discussion of the matters raised, agreed to approve a recapture or offset arrangement whereby the Fund would obtain a benefit equal to 50% of the net, after tax, profit of Seaboard's regional affiliate on Fund transactions, whether direct or attributable to the Fund. This proportion, it was noted, is significantly more advantageous to the Fund than the Waddell & Reed formulation which, on a similar basis, returns only approximately 40% of the net profits to their funds. It was also noted that this arrangement was as good an arrangement as any of the Funds affiliated with Seaboard.

Under the arrangement, the Seaboard affiliate would continue to retain 100% of commissions earned by Distributors and Planning which were not attributable to the Fund. As part of the arrangement, however, the affiliate, insofar as possible, would credit to the Fund all Fund-related underwriting commissions and tender offer fees.

The Board noted that fund brokerage would continue to be directed to brokers who have provided research, statistical and other services to the Portfolio Managers and to sellers of Fund shares, to the extent available without agreements regarding ratios, proportions or understandings as provided in the prospectus of the Fund. All transactions, the Board noted, would continue to be directed so as to achieve best execution and price for the Fund whether on the New York Stock Exchange, regional exchanges, the Third Market or otherwise.

Upon due consideration and in view of

1. The opportunity to obtain a reduction in the Fund's management fee through recapture arrangements available to Seaboard's PCSE affiliates, and
2. The potential benefit to the Fund considering the potential conflict of interest question, the return of commissions, and the requirement to obtain best execution, and
3. With the understanding that the Fund's trading will continue to be done on a basis most favorable to the Fund, upon motion duly made, seconded and unanimously carried, it was:



Competitive Associates Inc.  
Meeting of Board of Directors  
October 9, 1970

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RESOLVED: That the proposed arrangements for the direction of Fund brokerage to Distributors in return for a credit of 50% of the net, after tax, profit (defined in accordance with generally accepted accounting principles) on Fund-related brokerage of the Seaboard affiliates to the Fund, consistent with the requirements contained in the Fund's prospectus to obtain best execution with all credits to be used to reduce maximum expenses payable by the Fund, be and hereby is approved.

Mr. Underhill then requested that the Board be advised on a regular basis as to recent developments and changes in portfolio and personnel. It was suggested that the Fund Manager should make sure that each month, sufficient information be sent to all Directors to keep them advised of all material developments involving the Fund. (He suggested more frequent reports on the financial posture of the Fund, its Manager, and The Seaboard Corporation as well as reports on current sales and redemptions.)

Mr. Boesel then inquired as to the financial posture of the Fund Manager, Competitive Capital Corporation, and the owner of its stock, The Seaboard Corporation. Mr. Landau responded by advising the Board that in the first six months of 1970, Seaboard had lost \$1.1 million and a \$600,000 loss in the third quarter appeared to be a valid estimate. Mr. Landau also appraised the Board that there was a substantial decline in assets under management -- that income had been greatly reduced -- and that the cash situation was reasonably poor. However, the company had little debt and management was looking for ways to secure additional financing and had taken substantial steps to cut back on its expenses in an attempt to make the income and expenses meet.

Mr. Risman then asked the Board to consider the renewal of the Fidelity Bond as required by Rule 17(g)(1) of the Investment Company Act of 1940. Mr. Lerman explained to the Board the need for this Bond and the purpose of the Board's considering this issue at this time. In the past, the Board had taken the position that \$200,000 coverage was ample. Upon motion duly made and seconded, it was unanimously

RESOLVED: That the continuation of a \$200,000 Fidelity Bond in compliance with Rule 17(g)(1) of the Investment Company Act of 1940, be and hereby is approved.

Competitive Associates Inc.  
Meeting of Board of Directors  
October 9, 1970

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Mr. Randolph then requested that the Board consider the restricted securities in the portfolio and value them accordingly. Common stock of Four Seasons Equity Corporation and Four Seasons Nursing Centers of America, Inc. and warrants of Four Seasons Franchise Centers, Inc. had been issued by a single company which had filed a petition under Chapter X of the Bankruptcy Act. Mr. Boesel explained that the Fund had 11,250 shares of the parent holding corporation, 30,000 shares of the common stock of the operating subsidiary and 8,654 warrants of another affiliate. Mr. Randolph explained to the Board that there had been only limited over-the-counter trading in each of the issues since the petition in bankruptcy was filed and thus there was no reliable guide as to true market value. Upon motion duly made and seconded, it was unanimously

RESOLVED: That the Board value the holdings of Four Seasons Equity Corporation, Four Seasons Nursing Centers of America, Inc. and Four Seasons Franchise Centers, Inc. warrants at 50% of the most recent market trades.

It was then suggested that in accord with Section 32(5) of the Investment Company Act of 1940, the Treasurer and the Assistant Treasurer should be authorized to assist in the preparation of financial statements filed for the Fund. Upon motion duly made and seconded, it was

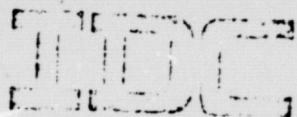
RESOLVED: That the necessary authority for the Treasurer and the Assistant Treasurer for purposes of assisting in the preparation of financial statements of the Fund be and hereby is approved.

There being no further business to come before the Board, upon motion duly made and seconded, it was unanimously

RESOLVED:           To adjourn.  
                          Adjourned.  
                          A true record.

*Michael R. ...*  
\_\_\_\_\_  
Acting Secretary of the Fund





Investment Data Corporation 170a

2602 WEST VICTORY BOULEVARD/BURBANK, CALIFORNIA 91505/(213) 845-2673

October 9, 1970

Mr. Michael Rismen  
Competitive Associates, Inc.  
9601 Wilshire Boulevard  
Beverly Hills, California 90210

Dear Mr. Rismen:

I certify that the figures shown below are the true and correct tabulation of the proxies for The Competitive Associates Incorporated return from the mailings made by you.

Outstanding shares on record date, 8/21/70 2,021,897

Total ballots mailed 12,192

Total ballots returned 6,243

Total shares voted 1,030,084

Percentage of shares voted 50.94%

Results of Vote	Yes	No
Proposition 1	975,851	54,233
2	999,374	30,709
3	952,392	77,692
4	961,544	68,540
5	961,372	68,712

Yours very truly,

INVESTMENT DATA CORPORATION

Charles J. Kalb  
Vice President

CJK:blo

COMPETITIVE ASSOCIATES INC.  
SPECIAL MEETING OF SHAREHOLDERS

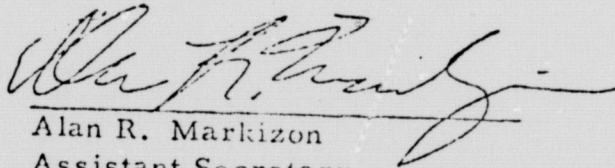
October 7, 1970

Pursuant to a motion to adjourn the special meeting of shareholders of Competitive Associates Inc. held at the office of the Corporation, 9601 Wilshire Boulevard, Beverly Hills, California on September 30, 1970, a special meeting of shareholders was held at the office of the Corporation on October 7, 1970 at 11:00 A.M., Los Angeles time.

The Assistant Secretary of the Fund, Alan R. Markizon, presided and kept the minutes. Being informed that a quorum was not present, Mr. Markizon declared the meeting adjourned until October 9, 1970.

VOTED:        To adjourn,  
              Adjourned.  
              A true record.

ATTEST:

  
Alan R. Markizon  
Assistant Secretary





COMPETITIVE ASSOCIATES INC.

6501 WILSHIRE BOULEVARD, BEVERLY HILLS, CALIFORNIA 90210/(213) 278 9500

October 9, 1970

Board of Directors  
Competitive Associates Inc.  
9601 Wilshire Boulevard  
Beverly Hills, California 90210

Gentlemen:

Effective immediately, I hereby tender my resignation as  
Secretary of Competitive Associates Inc.

Sincerely yours,

*Michael Risman*

Michael Risman

MR:yv

COMPETITIVE ASSOCIATES INC.  
SPECIAL MEETING OF SHAREHOLDERS

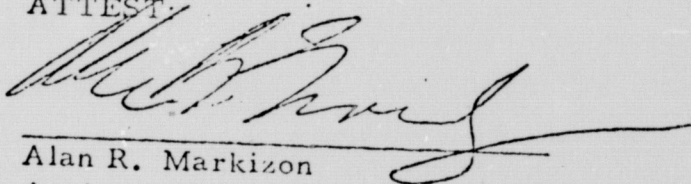
September 30, 1970

A special meeting of the shareholders of Competitive Associates Inc. was held at 9601 Wilshire Boulevard, Beverly Hills, California, on September 30, 1970 at 11:00 A. M., Los Angeles time, pursuant to written notice thereof sent by the Secretary to all shareholders of the Corporation, a copy of which is enclosed herewith.

The Assistant Secretary of the Fund, Alan R. Markizon, presided and kept the minutes. Being informed that a quorum was not present, Mr. Markizon declared the meeting adjourned until October 7, 1970.

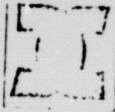
VOTED: To adjourn.  
Adjourned.  
A True Record.

ATTEST



Alan R. Markizon  
Assistant Secretary





COMPETITIVE ASSOCIATES INC.

9601 WILSHIRE BOULEVARD, BEVERLY HILLS, CALIF. 90210 • 278-8500

NOTICE OF DIRECTORS MEETING

October 7, 1970

NOTICE IS HEREBY GIVEN THAT A MEETING OF THE BOARD  
OF DIRECTORS OF COMPETITIVE ASSOCIATES INC. WILL BE  
HELD AT 11:00 A. M. ON WEDNESDAY, OCTOBER 7, 1970 AT  
THE OFFICES OF LAWLER, STERLING & KENT, 500 FIFTH  
AVENUE, NEW YORK, NEW YORK

MICHAEL RISMAN  
SECRETARY

September 25, 1970

175a

**EXHIBIT "H"**  
**COMPETITIVE ASSOCIATES INC.**

**MEETING OF THE BOARD OF DIRECTORS**

May 12-13-, 1971

A meeting of the Board of Directors of Competitive Associates Inc. (the "Fund") was held on May 12, 1971, at the offices of the Fund's counsel, Lawler, Sterling & Kent, 500 Fifth Avenue, New York, New York, at 2:00 p.m., pursuant to written notice. In attendance were six Directors, J. Robert Randolph, Michael Risman, J. Perry Smith, Henry Horne, Jr., Richard E. Boesel, Jr., and Arthur J.C. Underhill. James B. Barron was absent. Thus, a quorum was present. At the invitation of the Directors, Mr. Alan R. Markizon, Secretary of both the Fund and the Fund Manager, was also present. Also at the invitation of the Directors, representatives of the two Portfolio Managers of the Fund were present: Akiyoshi Yamada, Takara Asset Management Corp. and Ralph Shaw of Shaw Management Corp.

Mr. Michael Risman, Vice President of the Fund, called the meeting to order and presided and Mr. Markizon acted as Secretary and took minutes of the meeting.

Mr. Risman called on Mr. Randolph to explain the purpose of this first segment of the meeting. Mr. Randolph said that it was the Directors' view that they should meet with the Portfolio Managers in order to review in person the general conduct of the Portfolio Managers in relation to each of their segments of Competitive Associates Inc. The Directors thought that it was in the interest of the Fund that the Directors review such matters as investment concepts; portfolio turnover; number of issues in the portfolio; investment strategy; investment objectives; and structures of the management organizations themselves. Mr. Randolph then proceeded to call on each of the Portfolio Managers to have them review and discuss the above matters with the Directors. In addition to touching on all of the above matters, the Managers also discussed the recent action taken by the German government and the Mark as it relates to the value of the Dollar. All of the Directors participated in questioning the Managers as to their investment strategy, their investment procedures, turnover, objectives, etc.

Upon motion duly made and seconded and unanimously carried, at 4:45 p.m., the meeting was:

VOTED: To adjourn until 10:00 a.m., Thursday  
May 13, 1971.



The meeting was called to order on Thursday, May 13, 1971, at 10:30 a.m., by Michael Risman. In addition to those attending the previous session of this Board of Directors Meeting, the following were in attendance pursuant to invitation by the Board: Peter Landau, President of The Seaboard Corporation; Meyer Eisenberg, Esq. and Philip N. Smith, Jr., Esq., of Lawler, Sterling & Kent, counsel to the Fund Manager; and Ezra Levin, Esq., of Marshall, Bratter, Greene, Allison and Tucker, counsel to the Fund. In addition, James B. Barron, Director, was in attendance. Thus, a quorum was present. The three representatives of the Portfolio Managers were not in attendance at this session.

The minutes of the prior Meeting of the Board held on January 13, 1971, were distributed and read by the Board and the motion was then made, seconded and unanimously .

RESOLVED: That the Minutes of the Meeting of the Board of Directors of the Fund held on January 13, 1971 be and they hereby are approved.

The following materials were also distributed to the Board, and are attached to these Minutes: An article by Robert H. Mundheim, "Some Thoughts on the Duties and Responsibilities of Unaffiliated Directors in Mutual Funds," published in the University of Pennsylvania Law Review, Volume 115, page 1058, 1967; Mr. Walter W. Latimer's Treasurer's Report; copies of memoranda prepared by Alan R. Markizon, Secretary of the Fund, to J. Robert Randolph, President of the Fund, concerning inspection by Mr. Markizon of the Offices of Shaw Management Corp. and Takara Asset Management Corp.; material related to a borrowing by the Fund from The Bank of California; and additional material described below, relating to Takara Asset Management Corp.

Mr. Landau then reported on the financial conditions of The Seaboard Corporation, the parent company of Competitive Capital Corporation, the Fund Manager, and The Seaboard Funds Distributors, Inc., the Fund's Underwriter. Mr. Landau reported that all of the impending sales of Seaboard assets that had been discussed at the previous Board of Directors Meeting had now been consummated and that the result of the sales was that Seaboard's financial posture had improved substantially. The proceeds of the sale of MFB, Inc., Investment Data Corporation (40%), and Seaboard Life Insurance Company of America, Inc., by The Seaboard Corporation had been used to repay the Company's debts and meet other obligations of the Company. In addition, The Seaboard Corporation was left with substantial current assets that when liquidated would give the Company the working capital

needed to make significant advances. Mr. Landau reported that part of the proceeds had been used to pay the Funds' expense over-run that had been guaranteed by the Management Company. He reported that part of the over-run would be repaid in the normal course of business. Mr. Landau then left the Meeting.

Mr. Risman then called attention to the Treasurer's Report which had previously been distributed and the Directors reviewed the contents. Mr. Risman called attention to Exhibit 3 of the Report, entitled "Commission and Related Expenses of Seaboard Funds Distributors, Inc., for three months ended March 31, 1971." Mr. Underhill requested Mr. Markizon to review the numbers on that Exhibit and to explain how they were obtained. Mr. Markizon explained that "the brokerage commissions related to Competitive Associates Inc." were the revenues received by The Seaboard Funds Distributors, Inc. which were related to Portfolio transactions of Competitive Associates Inc. The next entry was the total expenses of The Seaboard Funds Distributors, Inc., related to the total mutual fund brokerage operation. The Statement then allocated a portion of expenses to Competitive Associates Inc. based on its proportion of the revenues. A provision was made for income taxes after which net income was arrived and the balance indicated is the amount to be deducted from Competitive Capital Corporation's fee in accordance with the sharing arrangement negotiated last October 9, 1970. Upon motion duly made and seconded and carried, it was unanimously

RESOLVED: That the Treasurer's Report, submitted by Walter W. Latimer, Treasurer of the Fund, not including ratification of the purchases and sales of Portfolio securities listed therein, be and hereby is approved.

Mr. Risman then called on Mr. Eisenberg, counsel to the Fund Manager, to give a current report on the legal aspects of the allocation of the Fund's brokerage and the general industry practices in reference to mutual fund brokerage and negotiated rates in national securities exchanges. In addition, Mr. Risman noted it would be necessary for the Fund to negotiate a rate with The Seaboard Funds Distributors, Inc. ("Distributors") for transactions having a value of more than \$500,000. Mr. Eisenberg reviewed the process of negotiations between Management and the Fund at the October 9, 1970 Board Meeting. He reminded the Board that at that Meeting they had negotiated with Management a procedure by which the Fund should receive a reduction of brokerage commissions for transactions executed on behalf of the Fund on national securities exchanges. As part of that process, the Fund places portfolio transactions with The Seaboard Funds Distributors, Inc., a member of the Pacific Coast Stock Exchange, an affiliate of the Manager and with other brokers who place business with



Distributors on the Pacific Coast Stock Exchange. The Fund obtains a reduction in its management fee payable to Competitive Capital Corporation in amounts equivalent to 50% of Distributors' after tax profit on the brokerage business related to the Fund. Mr. Eisenberg related that at that time the Board considered various alternatives to the above proposal which they finally adopted. In addition, in both the written material and discussion, they discussed at that time other uses of brokerage and had taken into consideration the fact that the advisor placed some of the Funds' brokerage with those brokers which provided it with research, statistical and related services. Mr. Eisenberg reminded the Directors that at that time they took into consideration the fact that in a substantial number of instances, brokers who provide research and other related services do not necessarily do business with Distributors on the Pacific Coast Stock Exchange, and therefore, by such placement of brokerage dollars, the Fund may have been foregoing certain recapture opportunities. Mr. Eisenberg reviewed the fact that it is a generally accepted position that the Investment Company Act permits a broker/dealer affiliated with a mutual fund who directly executes business for the Fund to keep 100% of the commissions for itself. Mr. Eisenberg also pointed out that the generally accepted view is that an affiliated broker/dealer who receives commission dollars which he does not work for in connection with an affiliated mutual fund trade must return all of those dollars to the Fund. Further, he pointed out that for those dollars which the Fund works for but receives indirectly (i.e., floor brokerage as opposed to four-way tickets on the Pacific Coast Stock Exchange) there is no general view as to the propriety under the Investment Company Act of 1940 of the affiliated broker seeking those dollars. Mr. Eisenberg went on to review for the Board the fact that they considered all of the above when reaching a decision in October to negotiate a 50-50 split, net of income taxes of the entire mix of business, with the Fund Manager and Underwriter. He also related that he believed that an affiliated broker/dealer and Fund could negotiate a sharing arrangement on the entire mix of business.

Mr. Eisenberg then reviewed the development in the area since the last Board Meeting in January. He pointed out that on April 5, 1971, the national securities exchanges abolished fixed commission rates for that part of a transaction in excess of \$500,000; that therefore, the Fund was now free to negotiate the commissions on certain transactions, rather than be bound by the fixed commissions that had been the rule before; that on the other hand, if commission, in fact, were reduced, Distributors' profits would be reduced and the split with the Fund would be reduced. Since April 5, 1971, on trades of value of more than \$500,000 with any of the Seaboard-affiliated Funds, Distributors has not charged a commission on that portion of the trade over \$500,000. Both the Underwriter and Management, consistent with a provision of the Investment Company Act of 1940 providing for customary brokerage commission on trades executed

on national securities exchanges through affiliated brokers, have asked the Board of Directors to negotiate with them a fee rate for those transactions of a value of more than \$500,000. Mr. Eisenberg then reviewed the various industry practices pointing out those of Oppenheimer & Co., which does not split related brokerage profits with the Fund and which charges the Fund whatever the party on the other side of the transaction is being charged; Merrill Lynch, which does not have an affiliated mutual fund, charges customers 3/10ths of 1% of the value of transactions over \$500,000; Salomon Brothers & Hutzler, a block position House, which does not have an affiliated mutual fund, apparently negotiates on each trade and is a little bit higher than most; and Dreyfus Fund which is paying its affiliated fund 3/10ths of 1%. He then indicated that he believed that 3/10ths of 1% of a value of over \$500,000 was consistent with what other firms are doing. He also indicated that he thought the Directors could take the factors mentioned both earlier that day and in his written presentation in October, to determine a fair rate of 1/4 of 1% and that management would accept such a rate. Revenue approved on this part of the mix would still be included in the sharing arrangement. He also called attention to the Treasurer's Report of the January and May meetings to reflect the types of profits accruing to the Fund. He also indicated that he felt it would be proper for the Directors to reaffirm, or re-negotiate, the sharing arrangement consistent with the experience thus far. Upon motion made by Mr. Barron and duly seconded by Mr. J. Perry Smith, it was unanimously (with the exception of Messrs. Risman and Randolph, who abstained)

**RESOLVED:** That on trades executed by The Seaboard Funds Distributors, Inc. on the Pacific Coast Stock Exchange for the Fund, of a value of more than \$500,000, the rate to be paid by the Fund for that portion over \$500,000 (or if that level is reduced over any other such reduced level) would be 1/4 of 1% with such fee proceeds being included in the revenues to be calculated to reduce the management fee and that such authorization shall automatically expire at the next Board Meeting; and be it

**FURTHER RESOLVED:** That after giving due consideration to all the factors surrounding the Fund's allocation of brokerage, the sharing arrangement adopted on October 9, 1970, plus the additional resolution made and adopted above, be reaffirmed.

Mr. Risman then called upon Mr. Markizon to speak about expense limitations. Mr. Markizon pointed out that various states have, as a requirement for shares to be sold in their state, placed a ceiling on expenses of the Fund. Expenses over that ceiling necessitate either a cessation of selling that state or reimbursement by the Manager to the Fund of the additional expenses. Traditionally, such limitations



are expressed as a percentage of average net assets. Mr. Markizon pointed out that he felt such limitations were both unfair and counter-productive. He believed that the Fund Manager's compensation should be negotiated with all factors being considered and that if the Directors felt the Manager was doing an incompetent job and not controlling expenses, they were free to reduce this compensation. In addition, such limitation theoretically, at a minimum, gave management an economic disincentive to risk expense dollars that might benefit the Fund. On the other hand, expense limitations are the laws of several of the states in which we sell, but are now in the state of flux. He then reported that for the year ending March 31, 1971, the Manager would reimburse Competitive Associates Inc. approximately \$60,000 for over-run expenses. He then presented Management recommendations which were that the Fund adopt revisions of its Investment Advisory contract, that the expense limitation shall be the lowest of any State in which the Fund is sold. If adopted at this time, pending further revision of the incentive compensation of the Fund Manager, such proposal would not reduce the expense reimbursement. However, under the present state law it could be expected to reduce the expense over-run reimbursement by  $\frac{1}{2}$  of 1% of the Fund's average net assets, if such assets do not exceed \$30,000,000. At the present asset level of \$15,000,000 such saving would be \$75,000. Mr. Risman pointed out that the \$60,000 figure above was not representative as the current management contracts, provided minimum base fees to the Fund Manager for the first time have only been in effect since October 12, 1970. If they have been in effect for the entire year, the over-run who have been significantly higher. At the current asset level, the over-run would have amounted to more than \$100,000. Therefore, if shareholders adopt this provision, after incentive fee is changed, at the current asset level, the shareholders will probably pay additional expenses of \$75,000 and the management company will save a like amount in the first full year that it is in effect. Upon motion duly made and seconded and unanimously carried (except for Messrs. Risman and Randolph, who abstained) it was

RESOLVED: That the Board recommend to shareholders that the Fund Manager's Contract with Competitive Capital Corporation provide for an expense limitation that would be the lowest of any State in which the Fund is sold.

Mr. Risman then called on Mr. Markizon to report on his familiarization with the offices, in operation, of the two Portfolio Managers of the Fund. Mr. Markizon reported that material distributed to the Board at the beginning of the meeting was his written report on inspections of both of the Portfolio Managers' offices. Mr. Markizon reported that he did not do an inspection as that term is usually meant when used by the staff of the Securities & Exchange Commission, but has visited both of the offices of the Portfolio Managers in order to gain familiarity with their operation.

He discussed their compliance procedures with them, checked to see they kept adequate records and research files and reviewed their conflict policies. Some time in the future, he reported that he hopes to make a more comprehensive inspection. He did report that at this point he found both the Manager's operations satisfactory.

Mr. Risman called on Mr. Markison to report on the modification of the contract with the Fund's Transfer Agent, Investment Data Corporation. Mr. Markison then reported that in consideration for the large volume of business and continued business, the Investment Data Corporation has offered to amend its Investment Advisory Contract with Competitive Associates Inc. to include insurance coverage at no cost. The revisions directed to the new Contract are necessary and upon motion duly made and seconded, it was unanimously

RESOLVED: That officers of the Fund be and hereby are authorized to execute a new Transfer Agency Contract with the Investment Data Corporation which will incorporate the existing contract and include additional provisions giving Competitive Associates Inc. the benefit of certain insurance policies that the Investment Data Corporation has procured from Lloyds of London.

Mr. Risman then discussed Proxy authorizations. Three principal items are going to be involved in this year's Proxy -- Revision of the Management Contract to take into consideration a revised expense limitation as described above and to revise the incentive fee to comply with the new provisions of the Investment Advisers Act; the election of Directors; and the appointment of auditors. Mr. Risman indicated that the management and the Board would negotiate the new incentive fee at the next Meeting. Mr. Risman discussed the job that Haskins & Sells has done as auditors for 1970-1971 and indicated that the job done and commensurate billing was satisfactory and recommended that the Board recommend to shareholders that Haskins & Sells be returned as the company's auditors for another year. Upon motion duly made and seconded, it was unanimously

RESOLVED: That the Board of Directors recommend to shareholders that Haskins & Sells be retained as the Fund's auditors for the year ending March 31, 1972.

Upon motion duly made and seconded, it was unanimously

RESOLVED: That the Board of Directors give the Officers of the Fund the authority to draft preliminary Proxy material and submit it to the Securities & Exchange Commission, but such material not be mailed until further review by the Board of Directors.



Mr. Risman brought up the problem of Takara Asset Management Corporation and its President, Akiyoshi Yamada. Mr. Risman reviewed some of the discussion at the last Meeting concerning the rumor and information that had come to the attention of the Officers and Directors of the Fund and the fact that Mr. Yamada had spoken to the Board at the last Meeting. Mr. Markizon had distributed a memorandum to the Board which included the Minutes of that discussion as he had originally drawn them and as they were submitted to Yamada for comments. Mr. Markizon submitted to the Board Mr. Yamada's comments and has reflected those in a proposed set of Minutes. In addition, a letter drafted by Lawler, Sterling & Kent to Mr. Yamada was distributed to the Board as well as a memorandum from Mr. Markizon to Mr. Randolph reflecting the fact that Mr. Yamada had not kept his appointment with Mr. Markizon when the latter was to inspect Takara's offices in March.

Mr. Risman called on Mr. Markizon to report on his activities on this matter. Mr. Markizon reported that certain records of the Fund had been subpoenaed in response to a formal order of investigation by the Securities & Exchange Commission into the activities of Mr. Yamada, his private partnership and offshore funds. Named in the order were some of the securities that Competitive Associates Inc. owns. In addition, Mr. Markizon reported that Mr. Randolph had previously testified before the Securities & Exchange Commission in this matter. Mr. Markizon additionally reported that he had that morning done an inspection and that Mr. Yamada's files disclosed several troubling matters which bear on his veracity. Mr. Yamada's files on Sovereign American Arts do not disclose that it is in the business which he disclosed to the Competitive Associates Inc. Board. It is clear that Mr. Yamada has been involved with securities of Hair Extension Centers, Inc. at various times because the files disclose that he and John Galanis wrote a put on the stock. Mr. Yamada told the Competitive Associates Inc. Board at the last Meeting that he had never had any connection with a Hair Extension Centers transaction. It also appears that some shares of Hair Extension Centers, Inc. may have been placed as collateral for a loan. The file on Regal Crest did not disclose that it was in the kind of business which the Board was led to believe that it was in.

Mr. Risman then called on Mr. Philip N. Smith, Jr. to report on Mr. Randolph's testimony before the Securities & Exchange Commission. Mr. Smith represented Mr. Randolph and the Fund at the proceeding. He reported that several of the facts which Yamada had related to the Board at the last Meeting were clearly not true. This related to comments related to the existence of the proceeding itself; dealings with Hair Extension Centers, Inc.; incidents surrounding the Kennington Note and the Takara Partners Portfolio. Mr. Levin also responded with more details concerning Mr. Yamada's veracity as it related to his dealings

in Hain Extension Conference, which tended to refute his comments that he had no relationship to that company. The Board then reviewed discussions which it had with Yamada in January, the facts that he related to them and the additional and countervailing facts that the attorneys in their investigations had been able to ascertain. Mr. Smith and Mr. Eisenberg reported on the findings that had been made when reviewing the transcripts of Mr. Yamada's previous testimony for the Securities & Exchange Commission. In some of the matters mentioned above, they found testimony at that time, to be different from his discussion before the Board in January. The Board was greatly disturbed at the quality of the securities purchased by Takara for the Fund and his failure to tell the truth concerning so many matters. The Board reviewed Takara's purchases on behalf of the Fund and was disturbed by the quality of the stocks which they purchased. Mr. Levin disclosed that Mr. Yamada was indebted to Provident Securities, Inc. and that many of the other accounts that securities purchased by Takara were of companies which had connections with Provident or had used them for an investment banker. The Board specifically reviewed each security in the Takara portion of the portfolio. After being duly moved, and seconded, it was unanimously

RESOLVED: To request the resignation of Takara Asset Management Corporation as a Portfolio Manager of the Fund effective immediately and failing to receive such resignation, the Officers shall be and hereby are authorized to take all steps necessary to terminate Takara's tenure as a Portfolio Manager as soon as possible. And be it

FURTHER RESOLVED: That the Minutes for the "Takara Segment" of the Board Meeting of January 13, 1971, be and hereby are approved as recommended by Mr. Markizon. And be it

FURTHER RESOLVED: That the Board should not ratify Takara purchases at this Board Meeting and that the Officers shall be and hereby are directed to investigate Takara purchases and report those findings to the Board at the next meeting. And be it

FURTHER RESOLVED: That the Board does hereby ratify the purchases recommended and made by the Shaw Management Corporation since the last Board Meeting.

After further review by the Board Members, particularly the report of Mr. Danolph of what he had learned about Fantastic Fudge, Inc. and



Firefly Enterprises, Inc. subsequent to their purchase by Mr. Yamada. Mr. Randolph related that in both cases, the companies did not have products, very few employees and in addition, Competitive Associates Inc. owns a disproportionate number of shares of the total shares in public hands. It was moved and seconded and unanimously

RESOLVED: That Mr. Randolph be instructed to sell Fantastic Fudge, Inc. and Firefly Enterprises, Inc. as soon as possible.

The Board then moved to the consideration of who should manage Takara's portion of the portfolio during the period immediately subsequent to the resignation or termination. The Board had not, up to that time, searched for new Portfolio Managers and therefore, it was believed to be imprudent to select one without further study. The Board then discussed the possibility that Mr. Randolph, on behalf of Competitive Capital Corporation be permitted to manage the Fund. Companies of which Mr. Randolph is President and which manage the assets of two other mutual funds, are affiliates of The Seaboard Corporation -- Admiralty Fund and The Income Fund of Boston, Inc. In addition, he manages private accounts in his capacity as President, Chairman of the Board and Chief Executive Officer of Chancellor Management Corporation, a registered Investment Adviser. The Board then discussed the problem created by the fact that Competitive Capital Corporation had not been chosen as a Portfolio Manager by the shareholders and that it might have conflicts with its role as a Fund Manager for Competitive Capital Fund. The Board then discussed the possibility of an investment committee to supervise Competitive's work. It was then duly moved and seconded and unanimously

RESOLVED: That Competitive Capital Corporation shall act as a Portfolio Manager for the period immediately following Takara Asset Management's resignation or termination and that it shall function as such until the next meeting of the Board of Directors. And be it

FURTHER RESOLVED: That before Competitive Capital Corporation may effect any investment transactions for Competitive Associates Inc. that each such transaction be approved of in advance by an investment committee made up of Mr. Randolph and any two unaffiliated Directors. And be it

FURTHER RESOLVED: That Competitive Capital Corporation shall not be paid as a Portfolio Manager for its services hereunder, although it may continue to be paid appropriate compensation as the Fund Manager as provided in the Fund Manager's Contract.

The Directors then discussed the future of the Fund and the various possibilities open to them. The Board discussed whether a replacement should be found for Takara's portion of the Fund's assets, or whether the structure of the Fund should be changed so that it would be managed as a conventional Fund. The discussion was tabled pending recommendation to be made by the Officers at the next Meeting.

Mr. Risman then introduced the topic of the Dividend. Competitive Associates Inc. had not declared a dividend since its inception and the Treasurer's Report disclosed that there was sufficient income to pay \$.20 (20¢) per share out of income. Mr. Boesel raised the question as to whether or not such dividend would be practicable to shareholders and whether or not the Internal Revenue Code, Subchapter M, required this dividend to be paid. Mr. Markizon replied that the Internal Revenue Code did not require that this dividend be paid at this time to qualify the company for a regulated investment treatment under Subchapter M. He said that he would check on the problem as to its taxability to the shareholders and left the room. Mr. Risman proceeded to review the problem of the non-payment by shareholders of the \$.50 (50¢) per quarter service charge that is awaiting payment out of the proceeds of any distribution. He reviewed the problem of the Fund caused by the fact that such charge has not been collected since the inception of the Fund and also the fact that the shareholders by their communications with the Fund had indicated their desire to have a dividend. He indicated that the accountants were asking that either the service charge be paid or the receivable to the Fund be written off. Mr. Markizon returned with the news that the accountants could not give advice until the end of the Fund's fiscal year, March 31, 1972, as to whether or not this dividend would be taxable to shareholders. Mr. Boesel then said that we should await payment of that dividend until such time as the tax status would be known. Upon motion duly made and seconded, it was, by a six-to-one vote, with Mr. Boesel voting against,

RESOLVED: That a dividend of \$.20 (20¢) out of income be paid on June 15, 1971 to shareholders of record of May 28, 1971.

Mr. Risman then called on Mr. Randolph to discuss the valuation of the securities which do not have a readily available market. The only securities owned by the Fund which the Board must value are those securities of Four Seasons Nursing Inns of America, Inc. and its subsidiaries, all of which are under the protection of the Bankruptcy Court sitting at the U.S. District Court for the Western District of Oklahoma. Mr. Randolph was not optimistic about realizing value from any of the securities, although it is always possible that a reorganization or a successful lawsuit might convey some benefits on common shareholders. Mr. Randolph pointed out that the marketplace, of course, had taken into consideration Four Seasons' bankrupt condition.



Historically, Four Seasons Nursing Centers of America, Inc., have been valued at 50% of market value as have the Fund's holdings of Four Seasons Equity Corporation. The Board has in the past placed no value to Warrants that the Fund owns for purchase of Four Seasons Franchise Centers, Inc. Common Stock no later than December 31, 1974. Mr. Randolph reminded the Board that the reason for the discount of the shares of Common Stock of the parent and subsidiaries is that the securities are restricted as to sale prior to registration pursuant to the Securities Act of 1933. Upon motion duly made and seconded, it was unanimously

RESOLVED: That the Board of Directors value the common stock of Four Seasons Nursing Centers of America, Inc. at 50% of the market value and set the valuation as fair and reasonable in the opinion of the Board. And be it

FURTHER RESOLVED: That the Board of Directors value the Fund's holdings of Four Seasons Equity Corporation at 50% of the market value and that such a valuation is fair and reasonable. And be it

FURTHER RESOLVED: That the Board of Directors ascribe no value to the Warrants for the purchase of Four Seasons Franchise Centers, Inc. held by Competitive Associates Inc.

Mr. Risman then called upon Mr. Markizon to discuss the Fund's proposed loan agreement with The Bank of California. Mr. Markizon related that the Portfolio Managers of the Fund had been fully invested, as of late, and that redemptions, although not of a great amount, have caused the Fund to have invested more than 100% of assets. The Fund has the authority to borrow money and it was proposed that the Fund temporarily borrow up to \$500,000 pursuant to a standard loan agreement with The Bank of California, N.A., which had previously been distributed to the Board. Mr. Markizon reported that the interest rate proposed by the Bank was a prime interest rate plus 2% and Messrs. J. Perry Smith and Doesel replied that this rate was significantly higher than had been charged mutual funds under similar circumstances. Mr. Barron, the President of a bank, also indicated that the rate was too high. Upon motion duly made and seconded, it was unanimously

RESOLVED: That the officers of Competitive Associates Inc. be and hereby are authorized to enter into certain loan agreements with the Bank of California, N.A. to borrow up to \$500,000 on a temporary basis at an interest rate which shall approximate 1% more than prime. The Board of Directors, by this Resolution does not endorse a policy at this time of buying on margin as a Fund policy, but such credit is to be used only to permit the fund which they invested to stay at a current level of absolute dollars, notwithstanding redemption.

Mr. Risman then called for new business. Mr. Levin was then recognized. Mr. Levin reviewed his firm's service as counsel to Competitive Associates Inc. for more than two years and indicated that for the last several months much of the legal work for Competitive Associates Inc. was done internally by its officers and to some extent on special matters by Lawler, Sterling & Kent. He indicated that as the change in Management of the Fund had occurred smoothly and now that the transition period was over, it was his firm's desire to resign as counsel to the Fund. Mr. Risman, on behalf of himself and the rest of the Board, thanked Mr. Levin for the services they had rendered to the Fund and for seeing it through the transition period. It was then moved and seconded and it was unanimously

RESOLVED: That the Board of Directors accept the resignation of the firm of Marshall, Dratten, Greene, Allison and Tuckner as counsel to the Fund.

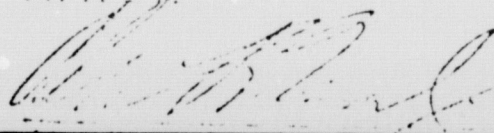
Mr. Risman then said that the discussion for new counsel to the Fund was in order and he indicated that Lawler, Sterling & Kent was counsel to the Admiralty Fund and The Income Fund of Boston, Inc., two other Funds managed by affiliates of The Seaboard Corporation, and that they were also counsel to the Fund Manager, Competitive Capital Corporation, and other Fund Manager affiliates of Competitive Capital Corporation. In addition, Lawler, Sterling & Kent is general counsel to The Seaboard Corporation, the parent of Competitive Capital Corporation. Mr. Risman indicated that it was his opinion that a satisfactory job had been done for those Funds by Lawler, Sterling & Kent and that the work they had done in the past for Competitive Associates Inc., on special matters, had also been most satisfactory. Mr. Risman disclosed that a partner of Lawler, Sterling & Kent, Peter Landau, was President of The Seaboard Corporation, the parent of the Fund Manager. After some discussion, which included questioning by the independent Directors of possible conflicts involved with Lawler, Sterling & Kent's being counsel to the Fund Manager and to the Fund and with those comments being responded to by the representatives of Lawler, Sterling & Kent, who were present, that on any matters which the Board felt was necessary, they would resign as counsel and that on matters of major significance and/or conflict apparent to them, they would discuss with the Board any attendant problems. It was then moved and seconded and unanimously (except for the abstentions of Messrs. Risman and Randolph)

RESOLVED: That the law firm of Lawler, Sterling & Kent be retained as counsel to the Fund.

Mr. Risman called for any other new business. Seeing that there was none, he called for a motion for adjournment. Upon motion duly made and seconded it was unanimously

VOTED: To adjourn.  
Adjourned.  
A true record.

ATTEST:





UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
COMPETITIVE CAPITAL CORPORATION and :  
COMPETITIVE ASSOCIATES, INC., :

Plaintiffs, :

v. :

72 Civ. 1986

AKIYOSHI YAMADA, LAVENTHOL, KREKSTEIN, :  
HORWATH & HORWATH, MORTON DEAR, ROBERT :  
E. BIER, THOMAS MARTINO, JR., TAKARA :  
ASSET MANAGEMENT CORPORATION and :  
IRA N. SMITH, :

Defendants. :

OPINION

-----x  
GRIESA, J.

I.

This is a motion for summary judgment made by three of the defendants -- the accounting firm of Laventhol, Krekstein, Horwath & Horwath ("LKH&H"), and two persons who were connected with LKH&H, Morton Dear and Thomas Martino, Jr.<sup>1</sup> The motions for summary judgment are granted and the action is dismissed as to these defendants.

The action was commenced on May 9, 1972, and is brought under Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q<sup>(a)</sup>/ Section 10(b) of the Securities Exchange

Act of 1934, 15 U.S.C. § 78j(b), S.E.C. Rule 10b-5, and Sections 206(1) and (2) of the Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-6(1) and (2). Reference is also made to the common law doctrines of fraud and breach of fiduciary obligation.

Basically, the complaint alleges that plaintiffs Competitive Associates and Competitive Capital, a mutual fund and its fund manager respectively, were induced by the fraud of defendants to employ defendant Yamada and a corporation owned by Yamada, defendant Takara Asset Management Corporation ("Takara Management"), to manage a portion of the portfolio of Competitive Associates. Plaintiffs make the following claim against LKH&H and the three persons connected with LKH&H. Plaintiffs claim to have been persuaded to employ Yamada partly because of Yamada's record in managing a private investment fund -- Takara Partners. Plaintiffs claim that LKH&H certified the financial statements of Takara Partners for the period July 16, 1969 (inception of Takara Partners) to December 31, 1969, and that these financial statements were false and misleading.



Plaintiffs allege that defendants Yamada, LKH&H, Dear, Bier and Martino "disseminated" these allegedly false Takara Partners financial statements to plaintiffs.

## II.

The following facts are established beyond dispute. The principal sources of these facts are (1) the deposition in this case of Alan R. Markizon, who was and is secretary of Competitive Associates and Competitive Capital; and (2) testimony of J. Robert Randolph, former president of Competitive Associates and Competitive Capital, given to the Securities and Exchange Commission May 10, 1971.

Competitive Associates was at all relevant times an open-end mutual fund, whose securities were selected by "portfolio managers". Competitive Capital, as fund manager for Competitive Associates, advised on the selection of the fund's portfolio managers.

In June 1970 Randolph became president of Competitive Associates and Competitive Capital. At that time a decision was made to employ certain new portfolio managers for Competitive Associates. Randolph took responsibility for making the inquiries regarding candidates for

portfolio managers. One of the people Randolph interviewed was Yamada, who was active in the management of two private investment funds -- Takara Partners and Armstrong Investors.

On June 12, 1970 Yamada wrote Randolph, sending a prospectus of Armstrong Investors and certain information about Takara Partners. The information about Takara Partners consisted of a list of Takara's general and limited partners and the following financial information:

"We presently manage a domestic partnership with \$6 million assets called Takara Partners. Takara was up 14.3% in 1969, and it is presently up 5.3% for 1970."

Although Randolph apparently saw some "portfolio sheets" for Takara Partners, consisting of lists of stocks owned and market values, Randolph did not see any financial statements for Takara Partners.

Randolph prepared a summary description of Yamada and the funds he was then managing, together with a description of other potential portfolio managers for Competitive Associates, and presented this material to the board of directors of Competitive Associates on June 25, 1970.<sup>2</sup> The board of Competitive Associates approved Yamada as one of the new portfolio managers. Yamada was to form a new corporation - Takara Management - as the entity actually to be



employed. On October 9, 1970 the board of directors and the shareholders of Competitive Associates authorized the execution of contracts with the new portfolio managers including Takara Management.

Takara Management functioned as a portfolio manager from October 12, 1970 to May 14, 1971.

It appears that at least by January 1971 the management of Competitive Associates began to have serious doubts about Yamada and Takara Management. There was an SEC investigation of some kind, and Randolph testified before the SEC on May 10, 1971. On May 12-13, 1971 the board of directors of Competitive Associates resolved to terminate Takara Management as a portfolio manager. It appeared that Yamada and Takara had recommended, among other things, purchase of stock in Fantastic Fudge, Inc. and Firefly Enterprises, Inc., neither of which companies had products or employees, according to information given to the Competitive Associates board.

### III

The present action by Competitive Associates and Competitive Capital was commenced on May 9, 1972. The complaint names Yamada and Takara Management as

defendants, as well as the accountants, and an attorney named Ira N. Smith.

The allegations of wrongdoing against LKH&H, Dear, Bier and Martino are contained in paragraphs 11-16 of the complaint. The most critical allegation is as follows:

"11. In early 1971, Defendants Yamada, Laventhol, Dear, Bier and Martino singly and in concert, directly and indirectly in connection with the purchase and sale of securities disseminated or caused to be disseminated to Competitive Capital and Competitive Associates financial statements for Takara Partners, a limited partnership organized under the laws of New York for the purpose of investing in securities, of which Defendant Yamada was a general partner, which financial statements were certified by Defendant Laventhol, and which included an income statement for the period from July 16, 1969 (inception) to December 31, 1969 and a balance sheet as of December 31, 1969."

The complaint goes on to allege that these financial statements were false and misleading. It is then alleged:

"14. By reason of the activities described in paragraphs 11 through 13 above, Defendants Yamada, Laventhol, Dear, Bier and Martino violated Section 17(a) of the 1933 Act, Section 10(b) of the 1934 Act and Rule 10b-5 thereunder, and Sections 206(1) and (2) of the Investment Advisers Act, as a result of which Competitive Capital and Competitive Associates ultimately suffered damages aggregating six million dollars (\$6,000,000)."



Paragraphs 15 and 16 of the complaint allege that these actions of Yamada, LKH&H, Dear, Bier and Martino constituted a breach of "their fiduciary obligations" toward plaintiffs and a fraud upon plaintiffs.

IV.

The record on the summary judgment motion shows conclusively that the 1969 Takara Partners financial statements were not "disseminated" by any defendants to plaintiffs in early 1971 or at any other time. Indeed, no representative of plaintiffs saw these financial statements until the SEC showed them to Randolph at the time of his testimony before the SEC on May 10, 1971 -- four days before the employment of Takara Management by plaintiffs was terminated. The allegations of paragraph 11 of the complaint about defendants LKH&H, Dear, Bier and Martino disseminating these financial statements to plaintiffs in early 1971 are totally lacking in substance.

The record demonstrates that plaintiffs neither obtained, nor relied upon, the Takara Partners financial statements audited by LKH&H in connection with <sup>plaintiffs'</sup> <sub>employ-</sub>ment of Yamada and Takara Management. Markizon testified

in his deposition that he had no knowledge of the dissemination of the Takara Partners financial statements to plaintiffs as alleged in paragraph 11 of the complaint. He testified that the only person who might have knowledge of such a thing would be Randolph. But Randolph in his testimony before the SEC on May 10, 1971, stated that he had never before seen these financial statements, or anything comparable.

The only financial information about Takara Partners which Randolph obtained prior to the employment of Yamada were the figures contained in the June 12, 1970 letter of Yamada and some "portfolio sheets" for the funds Yamada was managing, containing lists of stocks owned and market values.

The only financial information about Takara Partners which Randolph presented to the directors of Competitive Associates was the description in the June 12, 1970 letter. This letter does not refer in any way to the Takara Partners financial statements audited by LKH&H, nor do the figures in the June 12 letter correspond to the figures in these financial statements. In the letter, Takara Partners is said to have \$6 million in assets.



Takara is said to be "up 14.3% in 1969, and it is presently up 5.3% for 1970". By contrast, the audited financial statements of Takara Partners as of December 31, 1969 show assets of \$4.2 million. The audited financial statements do not show that Takara was "up 14.3%" in 1969, or "up 5.3%" for 1970.

Plaintiffs' contentions on this motion are without substance. Plaintiffs suggest that Randolph may have done more in his investigation of Yamada than is shown by his SEC testimony. Plaintiffs suggest the possibility that two former directors of Competitive Associates -- Richard Boisel and Robert Sprinkel -- may have known Yamada. Plaintiffs state that it is not known whether Boisel or Sprinkel may have seen the audited financial statements of Takara Partners. Plaintiffs suggest that there may have been some mention of LKH&H at the Competitive Associates board meetings of June 25, 1970 and October 9, 1970, although the minutes do not reflect, nor does Markizon recall, anything of the kind. Finally, plaintiffs point out that depositions have not been taken of some or all of the people who might have knowledge regarding these possible theories.

Clearly, this posing of hypothetically possible theories on which the accounting defendants might be responsible to plaintiffs is not sufficient to withstand a summary judgment motion. Strother v. Great Notch Corporation, 57 F.R.D. 113 (D.N.J. 1972). The argument that certain possible witnesses have not been deposed is insufficient to prevent the granting of summary judgment. Competitive Associates, Inc. v. Children's World, Inc., CCH Fed. Sec. L. Rep. ¶ 94,063 (S.D.N.Y. 1973). Plaintiffs have had ample opportunity to take the depositions of these persons during the two years in which the action has been pending. It should be noted that plaintiffs make no attempt to invoke the provisions of Rule 56(f) regarding a continuance of this motion to permit discovery.

An additional argument of plaintiffs against summary judgment needs to be dealt with. Plaintiffs assert that the accounting defendants may be liable to plaintiffs on the basis of the December 31, 1969 Takara Partners financial statements, because these financial statements were relied upon by the partners of Takara Partners, and the existence of Takara Partners, with its prestigious list of investors, was a factor in inducing plaintiffs to deal with Yamada. Plaintiffs also appear



to argue that the general "investment community" relied upon the Takara Partners financial statements, and that as a result Yamada had<sup>a</sup> good reputation among investors, which was another factor in Yamada being hired by plaintiffs.

This theory is, of course, entirely different from the claim made in the complaint, which was that plaintiffs had themselves actually received the Takara Partners financial statements, and relied upon them. Plaintiffs now advance the theory that they can recover on the basis of the Takara Partners financial statements, not because they relied on them, but because the partners of Takara Partners or the "investment community" relied on these financial statements.

The first flaw in this theory is that plaintiffs have not come forward with the slightest factual support for it. The theory is presented in the barest conclusory fashion in a memorandum of law.

In any event, plaintiffs have not offered any analysis as to how this theory could provide a basis for liability against the accounting defendants under the statutes and rule relied upon.

(a) In order for a party to be liable under Section 17 of the Securities Act, the wrongful conduct must be

committed "in the offer or sale" of a security. In order to incur liability under Section 10(b) of the Securities Exchange Act and S.E.C. Rule 10b-5, the wrongful conduct of the defendant must be "in connection with the purchase or sale" of a security. The final statutory provisions relied on are Sections 206(1) and (2) of the Investment Advisors Act, which prohibit an investment advisor from defrauding and misleading "any client or prospective client".

The pivotal fact is that the December 31, 1969 Takara Partners financial statements were not prepared either for plaintiffs or for the investment community in general. The LKH&H certificate on the financial statements was addressed to - and obviously prepared for - the partners of a private fund, Takara Partners. Plaintiffs have made no showing to the contrary.

There is no indication of any basis for holding the accounting defendants <sup>to plaintiffs</sup> liable because of the auditing and certification of the Takara Partners financial statements for the partners of that entity. Nowhere in the complaint, or in any affidavit, or even in the briefs, is there any explanation as to how such auditing and certification could constitute conduct "in the offer or sale" of a security to plaintiffs within the meaning of Section 17(a), or conduct "in connection with the purchase



or sale" of a security involving plaintiffs, within the meaning of Section 10(b) and Rule 10b-5. There is no indication that the accounting defendants' auditing and certification of the Takara Partners' financial statements were carried out in any way calculated to influence the investing public, or to have any such effect as contributing to the employment of Yamada as a portfolio manager for Competitive Associates. See Wessel v. Buhler, 437 F.2d 279 (9th Cir. 1971)<sup>cf.</sup> SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).

As to the Investment Advisors Act provisions cited by plaintiffs, there is clearly no indication of any basis for plaintiffs to claim that the accounting defendants' auditing and certification of financial statements for the partners of Takara Partners amounted to fraud or misrepresentation directed to plaintiffs.

For the foregoing reasons the motions of defendants Laventhol, Krekstein, Horwath & Horwath, Dear, and Martino are granted and the complaint is dismissed as to these defendants. Although the other accounting defendant, Bier, has not moved for summary judgment, the complaint is dismissed as to him.

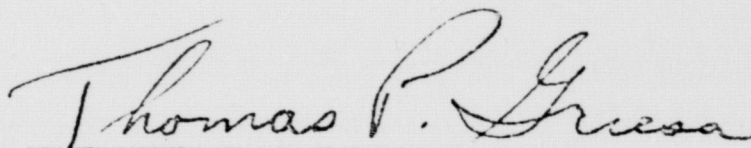
There is no just reason for delay in entering judgment dismissing the complaint as to these defendants,

and the clerk is directed to enter such judgment.

F.R. Civ. P. 54(b).

So ordered.

Dated: New York, New York  
June 26, 1974

A handwritten signature in cursive script, reading "Thomas P. Griesa". The signature is written in dark ink and is positioned above a horizontal line.

THOMAS P. GRIESA  
U.S.D.J.



FOOTNOTES

1. The complaint names another employee of LKMH - Robert E. Bier -- as a defendant. No motion has been made upon behalf of defendant Bier. However, the position of Bier in this case is precisely the same as that of defendants Dear and Martino, so that the reasons dictating dismissal of the case as to Dear and Martino apply equally to Bier.
2. There is some confusion in the motion papers about whether this was a meeting of Competitive Associates or Competitive Capital, but apparently it was in fact a board meeting of Competitive Associates.

# OFFICE RECORD

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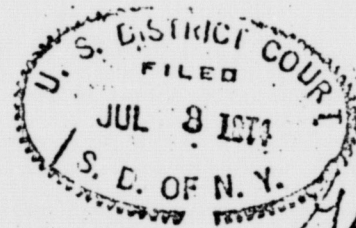
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*Griesa, J.*

JUL 8 1974

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
COMPETITIVE CAPITAL CORPORATION and  
COMPETITIVE ASSOCIATES, INC. :

JUDGMENT

Plaintiffs

72 Civil 1986(TPG)

-against-

AKIYOSHI YAMADA, LAVENTHOL, KREKSTEIN,  
HORWATH & HORWATH, MORTON DEAR, :  
ROBERT E. BIER, THOMAS MARTINO, JR., :  
TAKARA ASSET MANAGEMENT CORPORATION and :  
IRA N. SMITH :

Defendants

----- X

Defendants Laventhal, Krekstein, Horwath & Horwath, Morton,  
Dear and Thomas Martino, Jr., having moved the Court for summary  
judgment, pursuant to Rule 56, of the Federal Rules of Civil

Procedure, and the said motion, having been brought on to be heard  
before the Honorable Thomas P. Griesa, United States District Judge,  
and the Court thereafter, on June 26, 1974, having handed down its  
opinion granting the said motion, and directing the Clerk to enter  
judgment, and with the express determination that there being no  
just reason for delay of entry of this judgment, pursuant to Rule  
54(b), of the Federal Rules of Civil Procedure, it is,

ORDERED, ADJUDGED and DECREED: That defendants LAVENTHOL,  
KREKSTEIN, HORWATH & HORWATH, MORTON DEAR and THOMAS MARTINO, JR.,  
have judgment against the plaintiffs COMPETITIVE CAPITAL CORPORATION  
and COMPETITIVE ASSOCIATES, INC., dismissing the complaint as to  
them, and it is further,

MICROFILM

JUL 5 1974



ORDERED: That the complaint be and it is hereby dismissed as  
to defendant ROBERT E. BIER.

204a

Dated: New York, N.Y.  
July 3, 1974

Raymond F. Burghardt  
CLERK

APPROVED: 7/3/74

Thomas P. Grissa  
U.S.D.J.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
COMPETITIVE CAPITAL CORPORATION :  
and COMPETITIVE ASSOCIATES, INC., :

Plaintiffs, : 72 Civ. 1986 TPG

-against- : NOTICE OF APPEAL

AKIYOSHI YAMADA, et al., :  
Defendants. :

----- x

Notice is hereby given that Competitive Associates, Inc., plaintiff in the above entitled action, appeals to the Court of Appeals for the Second Circuit from the order dated June 26, 1974, and the judgment entered thereon, and from each and every part thereof.

Dated: New York, New York  
July 25, 1974

Yours, etc.

BUTOWSKY, SCHWENKE & DEVINE

By: David M. Butowsky  
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206a

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CHRISTY, FRY & CHRISTY  
45 Rockefeller Plaza  
New York, N. Y. 10020

HART & HUME  
10 East 40th Street  
New York, N. Y. 10016

-----  
COMPETITIVE CAPITAL CORPORATION  
and COMPETITIVE ASSOCIATES, INC.,  
Plaintiffs,

CASE NO. 72 Civ. 1986

JUDGE GRIESA

CLERK'S CERTIFICATE.

-against-

AKIYOSHI YAMADA, et al.,  
Defendants.  
-----

I, RAYMOND F. BURGHARDT, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the certified copy of docket entries lettered A-D, and the original filed papers numbered 1 thru 60, inclusive, constitute the record on appeal in the above entitled proceeding; except for the following missing documents:

DATE FILED

PROCEEDINGS

5/9/72

Complaint

11/1/73

Affidavit of M. Pollner

6/26/74

Opinion #40875 granting  
motions for Summary Judgment

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord, One thousand nine hundred and seventy \_\_\_\_\_, and of the Independence of the United States the \_\_\_\_\_ year.

\_\_\_\_\_  
Clerk of the Court.



SERVICE OF 2 COPIES OF THE WITHIN

Appellate Opinion  
IS HEREBY ADMITTED.

DATED:

10/28/74

Christy, Frey & Christy

Attorneys for

Morton Dear & Thomas Martino

SERVICE OF 2 COPIES OF THE WITHIN

Appellate Opinion  
IS HEREBY ADMITTED.

DATED:

10/28/74

Ed Wilkie Lee & Gallagher

Attorneys for

Leventhal Kicks & Co.  
Harvard & Harvard

SERVICE OF 1 COPIES OF THE WITHIN

Appellate Opinion  
IS HEREBY ADMITTED.

DATED:

Rogers & Wells

Attorney for